(21,244.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 448.

LEHIGH VALLEY RAILROAD COMPANY, APPELLANT,

vs.

CORNELL STEAMBOAT COMPANY, CLAIMANT OF STEAM-TUG "IRA M. HEDGES," &c.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 3, 1908.

1 United States District Court, Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
against
THE TUG IRA M. HEDGES, HER ENGINES, ETC., Respondent.

Statement.

1908.
Jan. 30. Libel filed.
Feb. 13. Exceptions to libel filed.
Apl. 3. Opinion by Adams, D. J.
Exceptions sustained.
May 11. Final decree filed.
" 19. Notice of appeal filed.
" " Assignment of errors filed.
" 23. Certificate of District Judge under act of March 6, 1891 filed.
June 19. Citation issued.
" 22. Petition of appeal filed.
" " Order allowing appeal filed.
" 25. Original citation with proof of service filed.

2 To the United States District Court for the Southern District of New York:

The libel of the Lehigh Valley Railroad Company against the tug "Ira M. Hedges," her engines, tackle, &c., and all persons intervening for any interest therein, in a cause of collision civil and maritime, respectfully avers:

First. The libellant is a corporation organized and existing under the laws of the State of New Jersey, and is and was at the times hereinafter mentioned in possession of the tug "Slatington" under a charter whereby the libellant manned and victualled the said steamtug.

Second. The tug "Ira M. Hedges" is now within this District and within the jurisdiction of this Honorable Court.

Third. On or about the 7th day of June, 1904, at about 6:10 P. M., the tug "Slatington" left Pier 44, North River, with carfloat "No. 22" alongside on the port side, bound for the Lehigh Valley Railroad Terminal at Jersey City. The said tug was properly manned and equipped and had a lookout who was attentive to his duties stationed forward on top of the cars.

When about amidstream and headed toward the Jersey Shore, the tug "Ira M. Hedges" was seen coming up the River well
3 off on the port side. The "Hedges" had two stone scows in tow, one on each side. In this situation the "Slatington" blew a signal of one whistle; but this signal was not answered by the "Hedges," which continued on her course. The "Slatington," receiving no answer, and seeing that the "Hedges" was not changing her course, was stopped, alarm whistles were blown, and the engines

were put in reverse motion; but the starboard corner of the scow "Helen," on the starboard side of the "Hedges," collided with the port corner of float "No. 22," damaging the scow and causing some damage to the guard rail on carfloat "No. 22."

The tide at the time was about high water slack, and the wind light from the southwest.

Fourth. Thereafter the Rockland Lake Trap Rock Company, owner of the scow "Helen," began an action in the Supreme Court of New York for Rockland County against the libellant, to recover the damages to the scow "Helen" caused by said collision. The said action came on for trial before Mr. Justice Kelly and a jury; and after hearing the evidence, a verdict was rendered for the Lehigh Valley Railroad Company. The cause was thereafter appealed by the owner of the "Helen" to the Appellate Division, for the Second Department, and such proceedings were had that the Appellate Division thereafter reversed the order dismissing the complaint, and remanded the cause for a new trial.

4 Thereafter the cause came on for a new trial before Mr. Justice Morschauser and a jury, and such proceedings were had that a verdict was rendered in favor of the plaintiff and against the libellant herein for the damages sustained by the scow "Helen," and thereafter the costs were taxed and judgment entered on June 10, 1907, against the libellant herein for the damages sustained by the scow "Helen," with interest and costs, in the sum of Twelve hundred and nine and 31/100 Dollars ($1209.31), which judgment the libellant thereafter paid.

The libellant expended in defending said action in counsel fees, witness fees and other expenses, the sum of Seven hundred and nineteen Dollars ($719.00).

Fifth. The said collision and the damages consequent thereon were caused or contributed to by the negligence of the tug "Ira M. Hedges," or those in charge of her navigation, in the following, among other particulars which will be pointed out at the trial:

I. In not having any, or any proper, lookout.

II. In not answering the one whistle signal of the "Slatington."

III. In that, having the "Slatington" on her starboard side, and the vessels being on crossing courses, she did not keep out of the way.

IV. In that she did not stop and back in time to avoid a collision.

5 Sixth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore the libellant prays that process in due form of law according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue out of and under the seal of said Court against the steamtug "Ira M. Hedges," her engines, boilers, tackle, &c., and that said steamtug, her engines, boilers, tackle, &c., may be seized and sold to pay the amount of the claim set forth in this libel, together with interest and costs, and for such other and further relief as may appear to this Honorable Court to be just and proper.

ROBINSON, BIDDLE & BENEDICT,
Proctors for Libellant.

6 STATE OF PENNSYLVANIA. *County of Philadelphia, ss:*

D. G. Baird, being duly sworn, says that he is the Secretary and an officer of the Lehigh Valley Railroad Company, the corporation libellant in the above-entitled suit. That the foregoing libel is true to the knowledge of this deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. That the reason why this verification is not made by the libellant is because the libellant is a corporation, and the grounds of deponent's belief as to all matters in said libel not stated upon his knowledge are investigations which deponent has caused to be made concerning the subject-matter of this suit and information acquired by deponent in course of his duties as an officer of the corporation libellant in this suit.

D. G. BAIRD.

Sworn to before me this 27th day of January, 1908.

[SEAL.] J. WM. ROBBINS,
Notary Public.

My Commission expires March 4, 1911.
Prothonotary's certificate attached.

7 [Endorsed:] 50-169 U. S. District Court, Southern District of N. Y. The Lehigh Valley Railroad Company Libellant *vs.* The Tug "Ira M. Hedges" Claimant. Libel. Robinson, Biddle & Benedict, Procts. for L'b't. No. 79 Wall Street, Borough of Manhattan, New York City. Filed Jan. 30th, 1908.

8 District Court of the United States for the Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY
vs.
THE STEAMTUG "IRA M. HEDGES," HER ENGINES, TACKLE, &C.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The Cornell Steamboat Company appears specially in this action and excepts to the libel filed herein in this Court, upon the ground that the same does not state a cause of action, and the matters therein set forth are not within the jurisdiction of this Court.

Wherefore, this claimant prays that the libel herein be dismissed with costs.

CORNELL STEAMBOAT COMPANY,
Claimant.

By S. D. CAYKENDALL, *Pres't.*

AMES VAN ETTEN,
Proctor for Claimant.
Rondout, City of Kingston, N. Y.

9 STATE OF NEW YORK, *County of Ulster, ss:*

S. D. Caykendall, being duly sworn, deposes and says, that he is the President of the Cornell Steamboat Company, the claimant in this action; that he has read the foregoing Exception and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

That the reason why this verification is made by deponent and not by claimant, is, the claimant is a corporation and deponent is an officer thereof, to-wit: President.

S. D. CAYKENDALL.

Sworn to before me, this 7th day of February, 1908.

HERMAN T. WOOD,
[SEAL.] *Notary Public.*

[Endorsed:] 50-169 U. S. District Court, Southern Dist. of N. Y. Lehigh Valley Railroad Company, *vs.* The Steamtug "Ira M. Hedges," her engines, &c. Copy Exception to Libel. Amos Van Etten, Proctor for Claimant, Kingston, N. Y. Filed Feb. 13th 1908.

10 United States District Court, Southern District of New York.

THE LEHIGH VALLEY RAILROAD COMPANY
against
THE TUG IRA M. HEDGES, HER ENGINES, ETC.

Admiralty.—Exception to Jurisdiction.—No Jurisdiction exists to enforce contribution from a joint tort-feasor where the common law remedy has been successfully invoked against another, especially where the latter has failed to avail himself of provisions in the state law for bringing in the party now sought to be made partly liable.

Robinson, Biddle & Benedict for libellant.
Amos Van Etten for Respondent.

ADAMS, *J.:*

This action was brought by the Lehigh Valley Railroad Company against the tug Ira M. Hedges, upon a cause of action stated in the libel as follows:

"Third. On or about the 7th day of June, 1904, at about 6:10 P. M., the tug 'Slatington' left Pier 44, North River, with carfloat 'No. 22' alongside on the port side, bound for the Lehigh Valley Railroad Terminal at Jersey City. The said tug was properly manned and equipped and had a lookout who was attentive to his duties stationed forward on top of the cars.

When about amidstream and headed toward the Jersey Shore, the tug 'Ira M. Hedges' was seen coming up the River well off on the port side. The 'Hedges' had two stone scows in tow, one on each

side. In this situation the 'Slatington' blew a signal of one whistle; but this signal was not answered by the 'Hedges,' which con-
11 tinued on her course. The 'Slatington,' receiving no answer, and seeing that the 'Hedges' was not changing her course, was stopped, alarm whistles were blown, and the engines were put in reverse motion; but the starboard corner of the scow 'Helen,' on the starboard side of the 'Hedges,' collided with the port corner of float 'No. 22,' damaging the scow and causing some damage to the guard rail on carfloat 'No. 22.'

The tide at the time was about high water slack, and the wind light from the southwest.

Fourth. Thereafter the Rockland Lake Trap Rock Company, owner of the scow 'Helen,' began an action in the Supreme Court of New York for Rockland County against the libellant, to recover the damages to the scow 'Helen' caused by said collision. The said action came on for trial before Mr. Justice Kelly and a jury; and after hearing the evidence, a verdict was rendered for the Lehigh Valley Railroad Company. The cause was thereafter appealed by the owner of the 'Helen' to the Appellate Division, for the Second Department, and such proceedings were had that the Appellate Division thereafter reversed the order dismissing the complaint, and remanded the cause for a new trial.

Thereafter the cause came on for a new trial before Mr. Justice Morschauser and a jury, and such proceedings were had that a verdict was rendered in favor of the plaintiff and against the libellant herein for the damages sustained by the scow 'Helen,' and thereafter the costs were taxed and judgment entered on June 10, 1907, against the libellant herein for the damages sustained by the scow 'Helen,' with interest and costs, in the sum of Twelve hundred and nine and 31/100 Dollars ($1209.31), which judgment the libellant thereafter paid.

The libellant expended in defending said action in counsel fees, witness fees and other expenses, the sum of Seven hundred and nineteen Dollars ($719.00).

Fifth. The said collision and the damages consequent thereon were caused and contributed to by the negligence of the tug 'Ira M. Hedges,' or those in charge of her navigation, in the following, among other particulars which will be pointed out at the trial:

I. In not having any, or any proper, lookout.

II. In not answering the one whistle signal of the 'Slatington.'

III. In that, having the 'Slatington' on her starboard side, and the vessels being on crossing courses, she did not keep out of the way.

IV. In that she did not stop and back in time to avoid a collision.

Sixth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and this Honorable Court.

Wherefore the libellant prays that process in due form of law according to the practice of this Honorable Court in cases of
12 admiralty and maritime jurisdiction may issue out of and under the seal of said Court against the steamtug 'Ira M.

Hedges,' her engines, boilers, tackle, &c., and that said steamtug, her engines, boilers, tackle, &c., may be seized and sold to pay the amount of the claim set forth in this libel, together with interest and costs, and for such other and further relief as may appear to this Honorable Court to be just and proper."

The Cornell Steamboat Company appeared in the action as claimant of the Hedges, as owner in possession, and filed an exception to the libel as follows:

"The Cornell Steamboat Company appears specially in this action and excepts to the libel filed herein in this Court, upon the ground that the same does not state a cause of action, and the matters therein set forth are not within the jurisdiction of this Court.

Wherefore, this claimant prays that the libel herein be dismissed with costs."

While the libel on its face would seem to claim a right to recover what it has been obliged to pay, yet it is urged that it only seeks contribution because the Hedges was in fault as a joint tort-feasor and urges that although the action could not be maintained at common law, the equitable powers of the admiralty are sufficient to give jurisdiction and create a right of recovery should the Hedges be found, upon trial, to have been a participant in the wrong done. Certain authorities have been cited to support the contention, viz: *The Mariska*, 100 Fed. Rept. 500, 107 *Id.* 989; *Erie Railroad Co. v. Erie and Western Trans. Co.*, 204 U. S. 220. Those, however, were admiralty cases and they do not pretend to give admiralty jurisdiction to correct injustice claimed to have arisen through defects in the common law system, to which a party has a constitutional right in marine matters, not actions *in rem*, as well as in others, to resort.

13 It is contended that the common law system is so deficient that a party may recover there against a single wrongdoer, where there is another, or others, equally culpable, without any right of contribution. It is true that an injured person may recover from any one of several joint tort-feasors, if no attempt is made to reach the others but it seems too much to say that there is no right to bring in others. On the contrary, it is provided in The New York Code of Civil Procedure as follows:

§ 452. (Am'd, 1901.) When court to decide controversy, or to order other parties to be brought in.

The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in. And where a person, not a party to the action, has an interest in the subject thereof, or in the real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment."

* * * * * * *

"§ 723. (Am'd, 1877, 1900.) Amendments by the court, disregarding immaterial errors, etc.

The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence, by conforming the pleading or other proceedings to the facts proved. And, in every stage of the action, the court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party. When amending a pleading or permitting the service of an amended or supplemental pleading in a case which is on the general calendar of issues of fact, the court may direct that the case retain the place upon such calendar which it occupied before the amendment or new pleading was allowed, and that the proceedings had upon the amended
14 or supplemental pleadings shall not affect the place of the case upon such calendar, or render necessary the service of a new notice of trial."

These sections have recently been before the New York Court of Appeals in *Gittleman v. Feltman*, 191 N. Y. 205. In an action to recover for personal injuries, an order was made permitting the plaintiff to bring in an additional defendant, which it claimed was a joint tort-feasor with the other defendants. An appeal was taken, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 26, 1907. The court of appeals said (209, 210):

"The questions certified in this case are:

First. 'Should the motion of the plaintiff to bring in the Surf Amusement Company as a party defendant herein have been granted?'

Second. 'Has the Supreme Court, upon the motion of the plaintiff, in an action to recover damages for personal injuries resulting from negligence, the *power* to bring in as defendant a party not named as a defendant at the time of the commencement of the action, against the objections of the defendants originally named and of the proposed new defendant?'

The granting of a motion of this character rests in the sound discretion of the court. It may grant in the furtherance of justice, on such terms as it deems just. The jurisdiction of this court is limited to the review of questions of law, and it, therefore, cannot review the discretion of the Special Term of Appellate Division. We, therefore, have no power to answer the first question certified. The second question, however, is as to the power of the Supreme Court to grant the motion, which calls for an interpretation of the provisions of the Code referred to. With reference to this question we have the power to determine the same, and we think that it should be answered in the affirmative, and the order appealed from affirmed, with costs."

It would appear, therefore, that in this state at least, the common law courts are not so deficient in power that it is necessary for parties to resort to a court of admiralty to secure justice in a case of this kind.

15 But suppose that justice can be better reached in a court of admiralty, does that give a litigant a right to resort to it in all events? It is doubtless true, that an admiralty judge is better qualified to determine controverted questions of fact and law in a complicated collision case, for example, but that does not prevent the common law courts from finally deciding questions of that nature, according to their methods, by actions *in personam*.

In Schoonmaker *v.* Gilmore, 102 U. S. 118, it was said (119):

"The single question in this case is, whether the courts of the United States, as courts of admiralty, have exclusive jurisdiction of suits *in personam*, growing out of collisions between vessels while navigating the Ohio River. This is a Federal question, and gives us jurisdiction; but we cannot consider it as any longer open to argument, as it was decided substantially in *The Moses Taylor*, 4 Wall. 411; *The Hine v. Trevor*, *id.* 555; *The Belfast*, 7 *id.* 624; *Leon v. Galceran*, 11 *id.* 185; and *Steamboat Company v. Chase*, 16 *id.* 522. The Judiciary Act of 1789 (1 Stat. 73, Sect. 9), reproduced in sect. 563, Rev. Stat., par. 8, which confers admiralty jurisdiction on the courts of the United States, expressly saves to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it. That there always has been a remedy at common law for damages by collision at sea cannot be denied."

The principle is well established that where a court obtains jurisdiction of a cause of action, it retains it, to the exclusion of all other courts, to the end. The libellant here seeks to create a right, which apparently does not exist and never has existed. The respondent had a right to invoke the common law remedy. In the trial of the action therein, the defendant was justified in contending, as it (now the libellant here) seeks to establish, that the

16 negligence was partly imputable to the tug Hedges. In order to recover in the state court, it was necessary to show some negligence on the part of the Slatington. Evidently the jury was finally convinced of the latter's fault, hence the verdict, which is made the basis of the claim here. It seems to be an injustice that the Hedges, or her owner, if she was in fault as alleged, should not respond for a part of the loss but the libellant failed to resort to means which the state law provided for bringing in the other defendant and I do not think it is now in a position to invoke the jurisdiction of this court to enforce contribution. If that was not attainable in the common law proceeding, it was an incident of the methods prevailing there and cannot be made the basis for a resort to admiralty.

The exception is sustained.

Apl. 3/08.

[Endorsed:] U. S. Dist. Court Southern District of New York. The Lehigh Valley Railroad Co. *vs.* The Tug Ira M. Hedges Engines etc. Opinion Adams, J.

17 At a Stated Term of the District Court of the United States of America for the Southern District of New York, held at the Court Rooms in the Post Office Building Borough of Manhattan, New York City, N. Y., on the 11th day of May, 1908.

Present: Hon. George B. Adams, District Judge.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
against
THE TUG IRA M. HEDGES, HER ENGINES, TACKLE, &C.; CORNELL STEAMBOAT COMPANY, Claimant-Respondent.

The above named libellant having on the 29th day of January, 1908, filed a libel in this court against the tug Ira M. Hedges, her engines, tackle, &c., and the Cornell Steamboat Company, owner of said steamtug, having on the 13th day of February, 1908, filed in the Clerk's office of said court a claim for said tug and a special appearance for the purpose of excepting to the libel, and on the same day having duly filed an exception to such libel in the following terms, to wit: "The Cornell Steamboat Company appears specially in this action and excepts to the libel filed herein in this court, upon the ground that the same does not state a cause of action and the matters therein set forth are not within the jurisdiction of this court;".

18 and such exception having been brought on for hearing on the pleadings before this court on the 17th day of March, 1908; after hearing Amos Van Etten, proctor for respondent-claimant, and Robinson, Biddle & Benedict, proctors for libellant, and due consideration having been had:

It is ordered, that the exception to the libel on the ground that the Court has no jurisdiction be and the same hereby is sustained, and it is

Further ordered, adjudged and decreed: that the libel be and is hereby dismissed on the ground the court has no jurisdiction.

GEO. B. ADAMS.

[Endorsed:] 50-169 U. S. District Court Southern District of New York Lehigh Valley Railroad Company Libe't *vs.* Tug "Ira M. Hedges," &c. Final Decree. Robinson Biddle & Benedict Proc's for Libe't Filed May 11 1908.

19 United States District Court for the Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
against
THE STEAMTUG "IRA M. HEDGES," HER ENGINES, ETC.; CORNELL STEAMBOAT COMPANY, Claimant.

SIRS: Please take notice that the libellant, Lehigh Valley Railroad Company, hereby appeals to the Supreme Court of the United States, from the final decree of this Court, dated the 11th day of May, 1908, and entered on the said day in the office of the Clerk

of this Court, and from each and every part of the said decree.
Dated, New York, May — 1908.
Yours &c.,

ROBINSON, BIDDLE & BENEDICT,
Proctors for Libellant, Lehigh Valley Railroad Co.

To Thomas Alexander, Esq., Clerk of the United States District Court, for the Southern District of New York.
Amos Van Etten, Esq., Proctor for claimant.

(Endorsed:) Notice of Appeal U. S. District Court. S. D. of N. Y. Filed May 19, 1908.

20 United States District Court, Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
against
THE STEAMTUG "IRA M. HEDGES," HER ENGINES, ETC.; CORNELL STEAMBOAT COMPANY, Claimant.

The Lehigh Valley Railroad Company, libellant herein, feeling itself aggrieved by the final decree in the above-entitled suit, entered in the Office of the Clerk of the United States District Court for the Southern District of New York on the 11th day of May, 1908, does hereby appeal from said order and judgment to the Supreme Court of the United States for the reasons specified in the assignments of error filed herewith, and it prays that this claim may be allowed, and that a transcript of the records, proceedings and papers upon which said final decree was made, duly authenticated, may be sent to the Supreme Court of the United States.
Dated New York, June 17 1908.
Yours &c.,

ROBINSON, BIDDLE & BENEDICT,
Proctors for Lehigh Valley Railroad Company,
79 Wall St., Borough of Manhattan, New York City.

21 The foregoing appeal is granted, and the claim on appeal herein is allowed.
Dated New York, June 17, 1908.

GEO. B. ADAMS,
United States District Judge.

Endorsed: Petition and order allowing appeal filed June 22, 1908.

22 United States District Court, Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
against
STEAMTUG "IRA M. HEDGES," HER ENGINES, ETC.; CORNELL STEAMBOAT COMPANY, Claimant.

Bond on Appeal.

Know all men by these presents:

That the United States Fidelity and Guaranty Company, having an office and usual place of business at No. 66 Liberty Street, Borough of Manhattan, City County and State of New York, is held and firmly bound unto the above-named Cornell Steamboat Company, in the sum of Two hundred and fifty Dollars ($250.00), lawful money of the United States, to be paid to the said Cornell Steamboat Company, for the payment of which, well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents.

Sealed with its seal and dated this 17 day of June, in the year of our Lord One Thousand nine hundred and eight.

Whereas the above-named Lehigh Valley Railroad Company has prosecuted its appeal to the Supreme Court of the United States, to reverse the decree rendered in the above-entitled suit by the
23 District Court of the United States for the Southern District of New York, and filed in the office of the Clerk of the said Court on the 11th day of May, 1908.

Now therefore the condition of this obligation is such that if the above-named Lehigh Valley Railroad Company shall prosecute its appeal to effect and answer all costs if it fails to make its plea good, and shall abide by and perform any decree which may be rendered by the Supreme Court of the United States or on mandate of the Supreme Court of the United States by the Court below, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.
By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest:
GEORGE E. HAYES, *Attorney in Fact.*

[Seal of The United States Fidelity and Guaranty Company.]

Sealed and delivered in the presence of:
WILLIAM F. ALLEN.

24 *Affidavit, Acknowledgment and Justification by the United States Fidelity and Guaranty Company.*

We Will Bond You.

[Vignette.]

Fidelity, Judicial, Burglary, Contract.

STATE OF NEW YORK, *County of New York, ss:*

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of The United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Lehigh Railroad Company as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the Manager of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Lehigh Valley Railroad Company is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with George E. Hayes, and knows him to be Attorney-in-fact of said Company; and that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said George E. Hayes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceeds its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

[Seal of U. S. Fidelity & Guaranty Co.]

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 17 day of June 1908.

[Seal of Notary.]

DANIEL C. DEASY,
Notary Public, New York County.

25 [Endorsed:] 50-169 U. S. District Court, Southern District of N. Y. Lehigh Valley Railroad Company Libellant *vs.* Steamtug "Ira M. Hedges" her engines etc. Cornell Steamboat Company Claimant. Copy Bond on Appeal and approval by District Judge. Robinson, Biddle & Benedict, Proctors for Libellant,

No. 79 Wall Street, Borough of Manhattan, New York City. The within bond is hereby approved as to form and sufficiency of the surety Dated June 19 1908 Geo. B. Adams U. S. D. J. Filed June 22, 1908 U. S. District Court S. D. of N. Y.

26 United States District Court for the Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
against
THE STEAMTUG "IRA M. HEDGES," HER ENGINES, ETC.; CORNELL STEAMBOAT COMPANY, Claimant.

The Libellant, Lehigh Valley Railroad Company, by Robinson, Biddle & Benedict, its proctors, assigns error to the final decree entered herein, on the ground that the learned Judge erred

In Finding:

First. That under the laws of the State of New York one joint tort feasor may bring in another.

Second. That there was no jurisdiction in admiralty to enforce contribution from the joint tort feasor where the common law remedy has been successfully invoked against the joint tort feasor seeking contribution.

Third. That a final decree should be entered dismissing the libel for want of jurisdiction.

In not Finding.

Fourth. That under the Laws of the State of New York one joint tort feasor cannot implead other joint tort feasors.

Fifth. That jurisdiction exists in admiralty to enforce con-
27 tribution against joint tort feasors, although the common law remedy has been successfully invoked against the joint tort feasor seeking contribution; and

Sixth. In not overruling the exceptions to the jurisdiction and requiring the claimant to answer the libel.

ROBINSON, BIDDLE & BENEDICT,
Proctors for the Libellant, Lehigh Valley Railroad Co.

(Endorsed:) Assignments of Error. U. S. District Court S. D. of N. Y. Filed May 19, 1908.

28 UNITED STATES OF AMERICA,
Southern District of New York, ss:

LEHIGH VALLEY RAILROAD COMPANY, Libellant-Appellant,
vs.
THE TUG IRA M. HEDGES, Appellee.

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the District Court in the above-entitled cause.

In Testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 26 day of May in the year of our Lord one thousand nine hundred and eight and of the Independence of the said United States the one hundred and thirty second.

[Seal District Court of the United States, Southern District of N. Y.]

THOMAS ALEXANDER, *Clerk.*

29 United States District Court, Southern District of New York.

LEHIGH VALLEY RAILROAD COMPANY, Libellant,
vs.
TUG "IRA M. HEDGES," HER ENGINES, ETC.

Certificate.

I, George B. Adams, Judge of the District Court of the United States, for the Southern District of New York, do hereby certify that the libel herein was dismissed by me for the reason that the claimant of the tug "Hedges" appeared herein specially, and filed exceptions to the libel as follows:

"The Cornell Steamboat Company appears specially in this action and excepts to the libel filed herein in this Court upon the ground that the same does not state a cause of action, and the matters therein set forth are not within the jurisdiction of this court;" and that the said exceptions came on regularly to be heard before me, and the claimant of the tug "Hedges" did urge that the United States District Court sitting as a Court of Admiralty had no jurisdiction to proceed to determine the matters alleged in the said libel, and had no jurisdiction over the cause of action set forth in the allegations of said libel; and

I do certify that the libel herein was dismissed and final
30 decree given for the claimant of said Steamtug "Ira M. Hedges" solely because I deemed that the United States District Court sitting as a Court of Admiralty had no jurisdiction to enforce contribution between joint tort feasors where the common law remedy had been successfully invoked against the joint tort feasor

seeking to enforce the contribution, and therefore had no jurisdiction to proceed and determine the cause set forth in the libel, and for no other reason.

Copies of the pleadings, the opinion and the final decree are hereto attached and made a part of this certificate.

This certificate is made in conformity with the Act of Congress of March 3, 1891, Chapter 517.

Dated, New York, May 26, '08.

GEO. B. ADAMS,
United States District Judge.

31 [Endorsed:] U. S. District Court, Southern Dist. of N. Y. Lehigh Valley Railroad Co. Libellant *vs.* Tug "Ira M. Hedges" her Engines etc. Certificate. Robinson, Biddle & Benedict, Procts. for Lbt., No. 79 Wall Street, Borough of Manhattan, New York City.

32 UNITED STATES OF AMERICA, *ss:*

By the Hon. George B. Adams, one of the Judges of the United States District Court for the Southern District of New York.

To Cornell Steamboat Company, Claimant of Steamtug "Ira M. Hedges," her engines, etc.:

Whereas the libellant, Lehigh Valley Railroad Company, has lately appealed to the Supreme Court of the United States from a final decree lately rendered by the District Court of the United States for the Southern District of New York, dismissing the libel herein, and has filed the security required by law; therefore

You are hereby cited to appear before the Supreme Court of the United States at Washington, on the 12th day of October next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand in the City of New York on the 19 day of June, in the year One thousand nine hundred and eight, and of the Independence of the United States the One hundred and thirty-second.

GEO. B. ADAMS,
Judge of the United States District Court.

Service of the foregoing citation is hereby admitted, this 24 day of June, 1908 without prejudice.

AMOS VAN ETTEN,
Proctor for Claimant.

33 [Endorsed:] U. S. District Court, Southern District of N. Y. Lehigh Valley Railroad Company Libellant *vs.* The Steamtug "Ira M. Hedges" her engines etc. Cornell Steamboat Company Claimant Citation O. Robinson, Biddle & Benedict, Proc-

tors for Libellant No. 79 Wall Street, Borough of Manhattan, New York City. U. S. District Court, S. D. of N. Y. Filed Jun- 22 1908. M.

34 [Endorsed:] 50-169 U. S. District Court, Southern District of New York. Lehigh Valley Railroad Company, Libelant, *vs.* The Steamtug Ira M. Hedges, her engines, &c., Respondent. Certificate of District Judge under Act of March 8, 1891, & Record.

Endorsed on cover: File No. 21,244. S. New York D. C. U. S. Term No. 448. Lehigh Valley Railroad Company, appellant, *vs.* Cornell Steamboat Company, claimant of steamtug "Ira M. Hedges," &c. Filed June 30, 1908. File No. 21,244.

United States Supreme Court,

OCTOBER TERM, 1908.

LEHIGH VALLEY RAILROAD CO., Appellant, *vs.* CORNELL STEAMBOAT CO., Claimant, tug "*Ira M. Hedges*," etc., Appellee.	No. 448.

SIR:

PLEASE TAKE NOTICE, that, upon the record herein, a motion will be made at a session of this Court, to be held at Washington, D. C., on the 12th day of October, 1908, at twelve o'clock, noon, or as soon thereafter as counsel can be heard, to advance this cause on the docket of this Court, and to submit the same on that day, in conformity with Rule 32 of the Rules of the Supreme Court of the United States.

Dated New York, September 3, 1908.

Yours, &c.,
GEO. H. EMERSON,
of Counsel for Appellant,
Office and Post Office Address,
79 Wall Street,
New York City.

To AMOS VAN ETTEN, Esq.,
Proctor for Appellee.

UNITED STATES SUPREME COURT,

OCTOBER TERM, 1908.

LEHIGH VALLEY RAILROAD CO., Appellant, *vs.* CORNELL STEAMBOAT CO., Claimant of the tug "*Ira M. Hedges*," etc., Appellee.	No. 448.

Now comes the Lehigh Valley Railroad Co., the appellant, by George H. Emerson, of counsel, and moves this Court to advance this cause upon the docket of this Court and for an order that the same may be heard in conformity with Rule 32 of this Court, upon the ground that the District Court of the United States for the Southern District of New York erred in holding that:

The United States District Court, sitting as a Court of Admiralty, has no jurisdiction to enforce contribution between joint tort feasors where the common law remedy has been successfully invoked against the joint tort feasor seeking to enforce the contribution.

Certificate, folio 30, p. 14.

Statement.

On June 7, 1904, about 6:10 P. M., the tug *Slatington* with *Carfloat No. 22* in tow alongside on the port side, was standing over from the New York shore, heading about for Communipaw in New Jersey. The carfloat be-

longed to the libellant, and it was the charterer of the tug, manning and victualing her.

Libel, Record, fol. 2, p. 1.

At the same time the tug *Hedges*, with two sand scows in tow—one on each side—was proceeding up the river, about the centre thereof. The sand scows and tug belonged to different owners.

Libel, Record, fol. 3, pp. 1, 2.

The *Slatington* blew a signal of one whistle, which was not answered. Then seeing that there was no change of course or speed on the part of the *Hedges*, the *Slatington* stopped, blew alarm whistles and backed.

Libel, Record, fol. 3, pp. 1, 2.

The *Hedges* came on, and brought the starboard corner of the scow *Helen*—the starboard boat of the *Hedges* tow—into collision with the port corner of the carfloat.

Libel, Record, fol, 3, p. 2.

Thereafter the owner of the *Helen* sued the libellant in the Supreme Court of New York, Rockland County. The cause came on for trial before Mr. Justice Kelly and a jury, and a verdict was rendered for this libellant.

Libel, Record, fol. 3, p. 2.

The case was then appealed, and the Appellate Division reversed, on the ground that the trial justice had instructed the jury that the scow *Helen* could not recover if the tug *Hedges* had been guilty of fault.

The Appellate Division saying:

> "There was some evidence in the case tending to show that the accident was in part due to the negligence of the tug 'Hedges,' and the learned Court, in its charge to the jury, said: 'I submit the question of negligence to you, whether the 'Hedges' was

guilty of contributory negligence as matter of fact,' and 'I charge you as matter of law that, if the master of the tug 'Hedges' was careless, the plaintiff here is charged with that carelessness. If the master of the tug 'Hedges,' in navigating this boat on that day, was guilty of carelessness, that justifies you in holding the plaintiff guilty of contributory negligence'; and 'no matter if he (the master of 'Slatington') was careless, if both were careless, the verdict must also be for the defendant.' By request the Court also charged that 'if the jury find that the tug 'Ira M. Hedges,' or the persons in command of such tug, were guilty of negligence which in any way contributed to the collision, the plaintiff cannot recover.' The plaintiff excepted to the charge in this respect, and we are to consider whether, under the circumstances, this was a correct exposition of the law.''

Rockland Lake Trap Rock Co. vs. the *Lehigh Valley R.R. Co.*, 115 App. Div., 628, at p. 629.

Upon a new trial a verdict was found against this libellant, judgment was entered, and this judgment has been paid.

Libel, Record, fol. 4, p. 2.

The libellant seeks by this libel to enforce contribution against the *Hedges*, which, it claims, was a joint tort feasor.

Libel, Record, fols. 4, 5, p. 2.

The claimant of the *Hedges* excepted to the libel on the ground

(1) That it does not state a cause of action.

(2) That the Court has no jurisdiction.

Exceptions, Record, fol. 8, p. 3.

The Court sustained the exception to the jurisdiction, and from this ruling the libellant now prosecutes this appeal.

Certificate, Record, fol. 30, p. 14.

FIRST POINT.

There is no method under the New York Code by which one joint tort feasor, defendant in an action, can implead another joint tort feasor as a defendant; nor, if there were, could libellant have compelled the payment by the claimant in the courts of New York of any part of a joint judgment.

We do not consider that the question of whether or not one joint tort feasor can implead another as defendant under the New York Code has really any great bearing upon the merits, because even if such were the case the libellant's right to contribution would not thereby be defeated, as we shall hereafter show in this brief; but as the question was considered at some length in the District Judge's opinion, and seems to have perhaps affected the result, the Court saying (fol. 16, p. 8):

> "It seems to be an injustice that the *Hedges*, or her owner, if she was in fault, as alleged, should not respond for a part of the loss, but the libellant failed to resort to means which the State law provides for bringing in the other defendant, and I do not think it is now in a position to invoke the jurisdiction of this Court to enforce contribution,"

we shall discuss it very briefly.

The fallacy in the District Judge's opinion on this point lies in the fact that he has accepted the case of *Gittleman* vs. *Feltman*, 191 N. Y., 205, as holding that a joint tort feasor defendant can implead another joint tort feasor as defendant, whereas all that case holds is that a *plaintiff* may so amend his pleadings as to bring in another tort feasor as defendant: an entirely different

proposition from one joint tort feasor impleading another as *defendant*.

The rule that one joint feasor can not implead another *as defendant* has been settled for many years in New York.

Chapman vs. *Forbes*, 123 N. Y., 532.
Bauer vs. *Dewey*, 166 N. Y., 402.

In the latter case the New York Court of Appeals, speaking of the former case, said at p. 405:

> "Moreover, it is evident that the Court had no intention of overruling or modifying it, or to hold otherwise than that in an action at law, where the plaintiff seeks a money judgment only, he cannot be compelled to bring in parties other than those he has chosen."

But even were the rule otherwise, the libellant would have been no better off had it caused the respondent to be made a party to the action at law. For assuming that a judgment had been rendered against both defendants, the libellant would have had no right to compel the plaintiff to enforce its judgment, or any part of it, against its co-defendant; nor could it, after it had satisfied the whole judgment, have procured any contribution in the Courts of New York from its joint judgment debtor.

SECOND POINT.

The fact that one of the parties injured by the collision elected to proceed at common law can not defeat the libellant's right to contribution—a right recognized by the Admiralty Law, and brought into existence the very moment the wrong is committed.

The District Judge denied jurisdiction on the ground that one of the parties having invoked the common law remedy, the result in that action was conclusive, and there being no right of contribution at common law between joint tort feasors, the District Court sitting as a Court of Admiralty would not enforce contribution where the common law remedy has been invoked.

That the right of contribution exists in admiralty is admitted, but the District Judge holds that the owner of the *Helen* having seen fit to pursue the common law remedy, the libellant cannot enforce contribution in admiralty.

On the argument below much weight was laid by counsel for the *Hedges* upon the fact that the owner of the *Helen* had taken his chances in a common law action where contributory negligence bars a recovery. But we cannot see how that has any bearing. The owner of the *Helen* was perfectly safe in pursuing the common law remedy because his boat was in tow, and was free from any negligence.

The same attorney represented the *Helen* in that action that represents the *Hedges* here, and he saw to it that the owner of the *Hedges* took no chances in the common law action by not making the claimant a party defendant in that action, well knowing that the

libellant here could not implead the claimant in that action.

The owner of the *Helen* could have proceeded in the common law action against this libellant or against both the libellant and the owner of the *Hedges*. Simply because the owner of the *Helen*, an innocent party, chooses to bring his action at common law against one of the joint tort feasors should not bar the libellant's right to contribution.

It was argued on the trial that the libellant is suing upon a judgment. That such is not the case is clearly shown by the fact that the libel (fol. 4, p. 2) sets forth not only the amount of the judgment, but also the legal expenses and claims for contribution to both.

The libel (fol. 4, p. 2) alleges the collision was caused or contributed to by the negligence of the *Hedges*, and the prayer in part is:

"* * * That the said steam tug, etc , may be seized and sold to pay the amount of the claim set forth in this libel * * *"

We are suing for contribution, and the amount of the judgment is set forth as part of the damages we have sustained, and as part of the amount to which the *Hedges*, if she is found, upon a trial, to be a joint tort feasor, should contribute.

The right of contribution in admiralty merely means that one of the joint tort feasors is bound to indemnify the other for his portion of the damages that the latter may have been compelled to pay. It is very much like a case in which one party has to pay a judgment or makes a compromise settlement, and then looks to his indemnitor for payment. The judgment or the amount paid in settlement is not conclusive upon the right of the party to recover from his indemnitor, but if the indemnitor is sued, then the amount of the judgment paid or the

amount paid in settlement is, in the event he is held liable, conclusive upon the indemnitor.

Therefore, in this case, the judgment in the action between the owner of the scow *Helen* and the libellant does not fix the liability of the owner of the *Hedges*. That must be established by a trial upon the merits. But if the owner of the *Hedges* is found upon a trial at fault and therefore bound to contribute, then the judgment in the case of the owner of the *Helen* against the libellant is conclusive as to the amount that the libellant has been caused to pay on account of the joint tort of itself and the *Hedges*, and the *Hedges* must pay one-half of that judgment, and other expenses.

There can be no doubt that the right of contribution exists in admiralty.

The first cause in which the right to contribution was decreed was a case in which the owner of the barge *Helena* filed a libel against the steamers *Jay Gould* and *Mariska*. The *Jay Gould* was arrested, but the *Mariska* was not arrested, because not found in the jurisdiction.

The case proceeded against the *Jay Gould*, and there was a decree entered against her.

Thereafter the owner of the *Jay Gould* filed a libel against the *Mariska* for contribution for one-half of the amount paid by it under the final decree in the first suit, and the legal expenses of the defense.

The owner of the *Mariska* excepted to the libel. The exceptions were sustained by the District Court, and the libel was dismissed.

The Mariska, 100 Fed. Rep., 500.

On appeal the decree of the District Court was reversed (107 Fed. Rep., 989), the Court in its opinion saying (at pp. 991, 992):

> "Here, if both vessels at fault be impleaded, the libellant has a decree not *in solido* against both for

the full amount of his damage, with right of execution in full against one, but a decree for a 'moiety of damages against each vessel, with an alternative right of recourse against either for so much of the moiety adjudged to be paid by the other as he is unable to collect from the latter.' (The Alabama, 92 U. S., 695); and, pursuing but one of the offending vessels, he is entitled to a decree for the whole amount of his damage (The Atlas, 93 U. S., 302; the Juniata, 93 U. S., 337). In the latter case it was remarked that the rights of the claimant of one vessel mulcted in the full amount of the damage against the vessel contributing to the wrong could not be determined in the proceeding, such vessel not being a party thereto. The remark, at the most, is merely suggestive of the opinion of the writer that a remedy exists. The right of contribution in such case has been recognized, as we think, by the courts permitting one vessel in fault paying damages to recoup one-half the damages paid from an amount adjudged to another vessel also in fault. The Hercules, 20 Fed. Rep., 205, and authorities cited; The Job T. Wilson (D. C.), 84 Fed. Rep., 204. In these cases, however, all parties in fault were before the Court. The fundamental, equitable principle is to equalize the burden among those who should bear it. The North Star, 106 U. S., 17. The supposed difficulty arises only when one of the offending vessels is not a party to the proceeding in which fault is adjudged. In such case it is not possible for the Court to adjust the equities, or to decree contribution. Does the right of contribution therefore fail? Can it be that the law is incapable to furnish a remedy for a recognized right? Will it be permitted, as at the common law, to one injured by the wrong of two or more to hold one for the injury and to absolve the others? We cannot think the courts of admiralty are so weak and so limited in power that they cannot find means to enforce a recognized right."

And in speaking of the reason for the 59th Rule, the Court at p. 992 said:

"This rule was declared as, we think, in manifest recognition of the right of contribution and to enable the courts of admiralty to impose the burden of loss upon all by whom the burden should be borne. The rule did not and could not create a right of contribution. It recognized the right as pre-existing, and to enforce that right declared a practice by which the recognized right might be enforced by the respondent in the proceeding instituted by one injured by the wrong of two or more vessels, so that before payment and in promotion of justice and for the speedy and complete determination of right, contribution should be decreed. It is not doubted that under this rule, if the 'Mariska' had been arrested and impleaded in the proceeding by the owners of the 'Helena,' the court would have decreed the fault of the former—if she was at fault—and have equalized the burden as between the 'Jay Gould' and the 'Mariska,' and have decreed contribution. But the latter vessel was without the jurisdiction, and could not, therefore, be brought in. Does the right of contribution, therefore, fail? Is the right dependent upon the accident of the locality of the vessel at the time of the proceeding? May not the owners of the 'Jay Gould,' having paid the amount decreed, proceed independently against the 'Mariska'? * * * * We find no case in which the direct question presented to us here has been determined; but the analogies of the law and the fundamental principles of right point clearly, as we think, to the conclusion that, if fault be established upon the part of the 'Mariska,' she should in this proceeding be compelled to bear her proportion of the burden which the wrong imposes. The decree against the 'Jay Gould' does not bind the 'Mariska,' nor is she entitled to the benefit of it, being not a party to the proceeding. As to her, the whole matter is at large; and it will be incumbent upon the appellant here to prove the fault charged. The decree is of moment to establish the fact of compulsory payment of damages by the 'Jay Gould.'"

As the Court said, the 59th Rule did not create the right of contribution, but merely recognized the right as pre-existing, and established a means by which it could be easily enforced. The right to enforce contribution does not fail merely because one of the guilty vessels is out of the jurisdiction. It is not dependent upon the accident of locality, nor should it be dependent upon the mere fact that one of the parties sees fit to pursue the common law remedy.

The right is not given by the form of remedy pursued, but is created by the wrong, and being of admiralty origin may be, and should be, recognized in admiralty so long as it remains unsatisfied.

This Court, speaking by Mr. Justice Holmes, has said:

> "The respondent set up three defenses below and here. It argued that there was no jurisdiction in admiralty over the claim in its present form; that the petitioner had no case upon the merits, and that it was concluded by the former decree. The Circuit Court of Appeals decided against the first two points before sustaining the third. We shall take them up in their order. The jurisdiction appears to us tolerably plain. If it be assumed that the right to contribution is an incident of the joint liability in admiralty and is not *res judicata*, it would be a mere historical anomaly if the admiralty courts were not free to work out their own system and to finish the adjustment of maritime rights and liabilities. Indeed we imagine that this would not have been denied very strenuously had the question been raised by proper pleadings in connection with the original suit. But if the right is not barred by the former decree, it would be still more anomalous to send the parties to a different tribunal to secure that right at this stage. For the decree was correct as far as it went, and, by the hypothesis, might stop where it did without impairing the claim to contribution. *That claim is of admiralty origin, and must be satisfied before complete justice is done.* (Italics ours.) It cannot

be that because the admiralty has carried out a part of its theory of justice, it is prevented by that fact alone from carrying out the rest. See The Mariska, 107 Fed. Rep., 989. On the merits, also, we have no great difficulty. The rule of common law, even that there is no contribution between wrongdoers, is subject to exception. Pollock Torts, 7th Ed., 195, 196. Whatever its origin, the admiralty rule in this country is well known to be the other way. The North Star, 106 U. S., 17; The Sterling and The Equator, 106 U. S., 647; Admiralty Rule 59."

Erie Railroad Co. vs. *Erie Transp. Co.*, 204 U. S., 220, at p. 225.

The Lower Court meets these decisions by saying that they involve cases originally arising in admiralty, and holds that by one of the parties (the innocent one, of course) proceeding at common law, this right given by the admiralty can be defeated.

We cannot possibly understand how any such position can be sustained. If the right of contribution exists at all, it exists from the very moment of the collision, being brought into existence by the collision, and it cannot be defeated or impaired simply because one of the parties elects to proceed in the common law forum.

Here the owner of the scow *Helen* could have proceeded either in admiralty or at common law, and in neither case would he have taken any risks, because he was an innocent party, his scow being absolutely under the control of the tug *Hedges*.

Simply because the owner of the *Helen* elected to proceed at common law against the libellant alone, cannot, and should not, defeat the libellant's right to proceed in admiralty against the *Hedges* for contribution after the owner of the *Helen* secures a common law judgment.

The procedure to enforce the right of contribution after a common law judgment is no different from the procedure

for contribution after a decree in admiralty. The common law judgment does no more and no less that what the decree in admiralty does—*i. e.*, it establishes the fact of compulsory payment of the damages.

The Mariska, 107 Fed. Rep., 989, at p. 993.

Suppose the owner of the *Helen* had proceeded in admiralty. He might have proceeded against both the *Hedges* and the libellant or against the libellant alone, as he did in the common law action. If he had proceeded against the libellant alone, the libellant could have done either one of two things. It could have impleaded the *Hedges* under the 59th Rule (something it could not do in the common law action), or, if the *Hedges* were out of the jurisdiction, or it was not desired to implead her, it could have defended the action to final decree, and then filed a libel for contribution.

The Mariska (*supra*).

If the libellant could have allowed the action, had it been brought in admiralty, to go to final decree without impleading the *Hedges*, and yet thereafter have enforced the right of contribution, why should it be barred from enforcing the right brought into existence by the collision, merely because the owner of the *Helen* saw fit to enforce his remedy by proceeding at common law against the libellant alone and so making it impossible for the libellant to implead the owner of the *Hedges?*

It must be remembered that this is not a case where the libellant is estopped by its election of the remedy, because it had nothing to say with regard to what remedy should be pursued.

The case would be different had the *Hedges* sued at common law for damages incident to a collision. Then the *Hedges* would have taken the chances of contributory negligence barring a recovery, and the final judgment

would then have been *res adjudicata* as to the *Hedges'* negligence. But here the negligence of the *Hedges* was never adjudicated. Counsel on argument below stated that the trial Court in the action between libellant and the owners of the scow *Helen* on the second trial instructed the jury as the Court did on the first trial, *i. e.*, that if the *Hedges* were guilty of negligence recovery was barred; but it is impossible to see how any Court could have given such instructions in the face of the Appellate Division opinion, and even if such instructions were given, that fact should not bar the right of contribution in this action.

As to the judgment in the common law action being *res adjudicata,* we think the opinion of this Court in the case of the *Erie Railroad Co.* vs. *the Erie Transportation Co.* (204 U. S., p. 220), shows clearly that this is not true. This Court said in that case, at p. 227:

> "If we are right, then this is a strong case for holding that the petitioner is not barred. It stands adjudicated that its pleadings did not open its present claim. They could not have done so because at that stage the petitioner, not having paid, it had no claim for indemnity, but only for exoneration. It was not bound to adopt the procedure permitted to it by Rule 59. It did ask leave to amend so as to protect its rights, but was met by the argument of the respondent and the opinion of the Circuit Court of Appeals that it could bring a new suit. This Court said the same thing in affirming the decree against The New York: 'If as between her and the "Conemaugh" she have a claim for recoupment, the way is open to recover it,' 189 U. S., 368. The same proposition was implied in The Juniata, 93 U. S., 337, 340."

In the case of The Juniata (*supra*), this Court said, at page 340:

> "We should adjudge that half the amount should be paid by the tug and the other half by the steamer,

but that the libel of the United States is against the steamer alone. The tug, therefore, cannot be reached in this proceeding. But the offence being a marine tort, and both being guilty, they are liable severally, as well as jointly, for the entire amount of the damage. The Atlas (*supra*), p. 302. The decree must therefore be changed so as to require full payment to be made to the United States by the claimants of the 'Juniata.' Whatever their rights may be as against Pursglove by reason of such payment of more than one-half must be settled in another proceeding. It cannot be done in this litigation."

If the right of contribution in admiralty can be defeated by the innocent party selecting his forum, then grave injustice may be done, something that admiralty, like equity, abhors. Take for illustration a collision case in which both ships are at fault and in which cargo on one of the ships is damaged. Assume that the facts of the collision were such the vessel carrying the damaged cargo could not take advantage of the Harter Act and that the cargo and the ship in which it is carried are represented by the same proctor, as is the case here with the *Helen* and *Hedges*. All that would be necessary to be done to relieve the vessel carrying the damaged cargo from all liability would be for the proctor to proceed at common law against the other vessel alone for the damage to the cargo. That vessel could not implead the vessel carrying the cargo, and, after judgment was entered, it could not, if the right of contribution is denied in such a case as this, proceed in admiralty for contribution. Such injustice should not be permitted.

The saving to the suitor of the common law remedy does not mean that under its guise a gross injustice may be done, and that admiralty shall be deprived of enforcing a right which it recognizes.

If, then, we are correct in our view that the right of contribution exists in admiralty from the moment the wrong

is committed and is not dependent upon the form of procedure any more than it is dependent upon the locality of the vessels at the time the action is brought, then the exception to the libel on the ground that the Court had not jurisdiction should have been overruled.

As to the exception that the libel does not state a cause of action, it is evident that if there is a right of contribution, the libel sets forth all the facts sufficient to constitute a cause of action. It sets forth facts concerning the collision which show clearly that the *Hedges* was at fault in that she was the burdened vessel and did not keep out of the way. It shows that the libellant, by reason of the collision, has been forced to pay to a third party all the damages sustained by such third party by reason of the collision. It therefore sets forth clearly a cause of action for contribution in admiralty.

THIRD POINT.

The decree should be reversed, with costs, and the cause remanded to the District Court with instructions that the exceptions be overruled, the claimant allowed to answer, and the action proceed to trial on the merits.

Respectfully submitted,

GEO. H. EMERSON,
Proctor for Appellant.

WILLIAM S. MONTGOMERY,
Of Counsel.

United States Supreme Court,

OCTOBER TERM, 1908.

LEHIGH VALLEY RAILROAD COMPANY, Appellant, *against* CORNELL STEAMBOAT COMPANY, Claimant, Tug IRA M. HEDGES, etc., Appellee.	No. 448.

MEMORANDUM IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS.

The mere fact that the preamble of the libel states the cause of action as one of collision, or that appellant contended in the Court below that the cause was one of contribution, does not necessarily give the District Court jurisdiction of the subject matter.

The question is : do the facts alleged in the libel give the Court jurisdiction ?

Take the case of an action brought in Admiralty upon a non-maritime contract. The preamble in such a case would probably be the time-honored one of "In a cause of contract, civil and maritime."

Such language would not of itself give the Court jurisdiction of the subject matter.

Again, the libel might state a cause of action on the contract, but admiralty would have to decline jurisdic-

tion because of the non-maritime character of the contract.

By so doing the Court would simply hold that an admiralty court had no jurisdiction, because the libel had not stated a cause of action within the admiralty jurisdiction.

Here the Court below has held that on the facts alleged it had no jurisdiction.

It does not hold that the cause of action was one for contribution and that no cause of action for contribution is stated in the libel.

What it does hold is that admiralty has no jurisdiction over an alleged cause of contribution where one of the parties has elected to take advantage of his constitutional right to pursue the common law remedy.

In other words, that admiralty had no right or jurisdiction to interfere after one of the parties had pursued his common law remedy.

> "Jurisdiction may be defined to be the right to adjudicate concerning the subject matter in a given case."
>
> *Reynolds* vs. *Stockton*, 140 U. S., at p. 268.

Here the District Court has expressly held that it had no right to adjudicate concerning the subject-matter.

It is in this that the case at bar seems to us to differ from the cases cited on appellee's brief, *i. e.*, *Smith* vs. *McKay*, 161 U. S., 355, and *Blythe* vs. *Hinckley*, 173 U. S., 501.

In *Smith* vs. *McKay*, at page 357, it appears that

> "The defendants below appealed upon the express ground that the court erred in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction, and prayed that their appeal should be allowed, and *the question of jurisdiction* be certified to the Supreme Court, and that *said appeal was allowed.*"

In *Blythe* vs. *Hinckley*, the Circuit Court dismissed the bill on the ground that the remedy was at law and not in equity, but it appeared further that the Circuit Court dismissed the bills on another ground, *i. e.*, that the judgments of the State Court could not be reviewed by that court on the reasons put forward.

Blythe vs. *Hinckley*, 173 U. S., at p. 507.

In neither of those cases was there a certificate that the lower court had dismissed the cause solely on the ground that the court had no jurisdiction.

Here, the District Judge held in his opinion that there was no jurisdiction; the final decree was entered and a certificate was granted solely upon that ground.

Under such circumstances what could the appellant do but prosecute this appeal?

In view of the opinion of the District Judge and the entry of the final decree on the ground that the Court had no jurisdiction, if this Court should dismiss this appeal it is possible that the appellant would be barred from having the District Judge's opinion reviewed at all, because the Act of March 3, 1891, Chap. 517, Sec. 5 (26 U. S. Stat., at p. 827), provides:

> "That appeals or writs of error may be taken from the District Court, or from the existing Circuit Court direct to the Supreme Court in the following cases:
>
> In any case in which the jurisdiction of the Court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the Court below for decision."

And Section 6, at p. 828, provides:

> "That the Circuit Court of Appeals established by this Act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Court in all cases other than those provided for in the preceding section of this Act, unless otherwise provided by law, * * *."

Under this language, should the appellant take an appeal to the Circuit Court of Appeals, that Court might very well say that the opinion of the District Judge having been that there was no jurisdiction, and the decree entered and a certificate given solely upon that ground, it was barred by Section 6 from entertaining an appeal from the final decree of the District Court.

Manifestly, under the circumstances of this case, it would be a very great hardship to dismiss its appeal, *with costs.*

The motion to dismiss should be overruled.

Respectfully submitted,

GEO. H. EMERSON,
Counsel for Appellant.

W. S. MONTGOMERY,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. [redacted]18.

LEHIGH VALLEY RAILROAD COMPANY, Appellant,

vs.

CORNELL STEAMBOAT COMPANY, CLAIMANT OF STEAMTUG "IRA M. HEDGES," &c., Appellee.

MOTION TO DISMISS, OPPOSING MOTION TO ADVANCE.

AMOS VAN ETTEN,
Proctor for Claimant-Appellant,
Kingston, N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1908.

LEHIGH VALLEY RAILROAD COMPANY, *Appellant*,
against
THE CORNELL STEAMBOAT COMPANY, Claimant, etc.,
Appellee.
No. 448.

PLEASE TAKE NOTICE that at the opening of court on October 12, 1908, or as soon thereafter as counsel may be heard, I shall present a motion to dismiss the appeal herein upon the ground that it appears on the face of the record that the question involved is not one of jurisdiction within the meaning of the Judiciary Act of 1891, permitting appeals to the Supreme Court from the District Court on the question of jurisdiction.

Yours. &c.,
AMOS VAN ETTEN,
Proctor for Appellee,
22 Ferry Street,
Kingston, N. Y.

To
GEO. H. EMERSON, Esq.,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

LEHIGH VALLEY RAILROAD COMPANY, *Appellant*, *against* THE CORNELL STEAMBOAT COMPANY, Claimant, etc., *Appellee.*	No. 448.

And now comes the respondent, Cornell Steamboat Company, and respectfully moves the court to dismiss the appeal of the Lehigh Valley Railroad Company in this action upon the ground that the question involved and certified is one of general maritime law and not a question of the jurisdiction of the Court. The United States District Court had jurisdiction of the parties and had jurisdiction of the subject matter which was, as appears from the libel, a cause of collision. The exception of the defendant raised the questions that no cause of action was stated in the libel and further that the matters therein were not within the jurisdiction of the court as set forth in the alleged cause of action, which, as appears from the libel, was of a different nature from that stated in the certificate. Quoting from the opinion of the District Judge (Transcript of Record page 6) "*While the libel "on its face would seem to claim a right to recover "what it has been obliged to pay, yet it is urged that "it only seeks contribution.*"

The question certified therefore arose upon the hearing in the District Court. The certificate filed states that the libel was dismissed and final decree given solely because the United States District Court sitting as a court of admiralty had no jurisdiction to

enforce contribution between joint tort-feasors where the common law remedy had been successfully invoked against the joint tort feasor seeking to enforce the contribution. In so far as such question was concerned the court had jurisdiction of the parties and of the subject matter. The position of the appellant and the authorities cited by him confirm the jurisdiction of the court. If the court erred in determining the question as a matter of maritime law, the appeal from that decision would lie to the Court of Appeals and not to this court.

Smith vs. McKay, 161 U. S., 355.
Blythe vs. Hinckley, 173 U. S., 501.

WHEREFORE the respondent prays that the said appeal may be dismissed with costs.

AMOS VANETTEN,
Proctor for Cornell Steamboat Company, Appellee.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1908.

LEHIGH VALLEY RAILROAD COMPANY, *Appellant*, *against* THE CORNELL STEAMBOAT COMPANY, Claimant, etc., *Appellee*.	No. 448.

And now comes the Cornell Steamboat Company, the appellee, in opposition to the motion to advance this cause and prays that such motion be denied, or, if granted, that the appellee have opportunity to make argument or submit a brief on the merits within such time as may seem to the court proper.

Respectfully submitted,

AMOS VAN ETTEN,
Proctor for Appellee.

Supreme Court of the United States.

LEHIGH VALLEY RAILROAD COMPANY,
Appellant,

against

CORNELL STEAMBOAT COMPANY,
Claiment of Steamtug *Ira M. Hedges*, etc.,
Appellee.

SUPPLEMENTAL BRIEF ON BEHALF OF APPELLANT.

The arguments of the appellant upon the merits are fully set forth in its brief attached to its motion to advance, and its contentions in opposition to the motion of the claimant to dismiss the appeal upon the ground that the jurisdiction of the District Court is not involved are fully set forth in its memorandum opposing the motion to dismiss. There are, however, a few additional suggestions with regard both to the merits and to the motion to dismiss, which we wish to bring to the Court's attention.

First.—As to the motion to dismiss.

Our view that the question here involved is one of jurisdiction, is, we think, supported by *Hughes on Admiralty*, where, in considering the question of contribution, it is said at page 285:

> "Whether this can be done in admiralty or not is a question of first impression, so far as known to

the writer. It would seem on principle that such a suit would lie even in the admiralty. If the Supreme Court, by rule, can confer jurisdiction on an admiralty court to bring the other vessel in by petition, as is done by the 59th Rule, that at least shows that the right is one of admiralty character, for a Supreme Court cannot by rule make a thing maritime which is not so by nature. It can only give a maritime remedy to a right maritime by nature. It has been seen in another connection that where a salvor collects the entire salvage due, his co-salvors can sue him in admiralty to enforce an appointment or contribution, and this would seem to be a similar case. Admiralty has undoubted jurisdiction to compel contribution in cases of general average, and the doctrine now under discussion originated in the law of average. It is believed, therefore, that it will be finally settled as the law that contribution may be enforced in an admiralty proceeding, probably *in rem*, and certainly *in personam*, as between the owners of two colliding ships, where one has been compelled to pay more than his share. It seems a necessary corollary from the doctrine that a decree is for half against each, with a remedy over, thus making it a case where one is necessarily surety for the other in case of a deficit."

Whatever doubt may have existed in regard to the over-ruling of the motion to dismiss, has, we think, been set at rest by the opinion of this Court in the case of *The Jefferson*, 215 U. S., p. 130. In that case the libel was dismissed by the District Court for want of jurisdiction. The appellee there, as here, contended that the appeal was wrongfully allowed, because, although in form of expression the Court below dismissed the libel for want of jurisdiction, its action was based really upon the conclusion that the facts alleged were insufficient to authorize a recovery, even though the case were within the jurisdiction of the Court.

While in this case the cause of action has been formally

stated by the pleader as one of collision, it is clear from the facts alleged that the relief sought is a decree for contribution, and therefore the action is really one for contribution between joint tort feasors to a maritime tort and so is within the admiralty jurisdiction. The exceptions to the libel challenged the jurisdiction of the Court over the cause of action asserted in the libel, because the action was for contribution by a joint tort feasor who had been proceeded against at common law; and they also raised the question of the sufficiency of the facts alleged to constitute a cause of action. It is evident, both from the opinion of the Court and the certificate, that the District Judge considered that the libel stated sufficient facts to constitute a cause of action for contribution, but that he had no power to enforce such contribution. The District Judge's theory being that, since the tort feasor suing for contribution had been proceeded against at common law, there was no jurisdiction in admiralty to allow a recovery, because to do so would defeat the common law doctrine of no contribution between joint tort feasors.

Should the motion to dismiss be granted, the result would be highly inequitable; because the libellant would then be barred from any chance of a recovery, although the District Judge considered the libel stated a good cause of action, and would have permitted the action to proceed to a trial on the merits, but for the fact that he thought he had no power to enforce contribution in view of the facts alleged in the libel.

Second.—As to the merits.

It is said in *Hughes on Admiralty*, in considering the rule of the division of damages, page 276:

> "An examination of these old codes reveals another very important fact in relation to it, and that is that it originated, not in the law of torts, but in the law

> of average. It is under that head in the Ordinances of Louis XIV., and the language of others shows that it was treated as a *contribution* [italics ours], and not as a mere liabilitity on the ground of tort."

The view that the origin of the rule of division of damages is in the law of average is sustained by the dicision of this Court in *The North Star* (106 U. S., 17), in which case Mr. Justice Bradley said at page 20:

> "On the contrary, the almost invariable mode of statement is that the joint damage is equally divided between the parties; or (*as in some authorities*) *it is spoken of as a case of average* [italics ours]."

Contribution among joint tort feasors in admiralty, being really a corollary of the rule of division of damages, therefore has its origin in the law of averages, and it seems to us that the language of Mr. Hughes [writing before the decision in *The Mariska* (107 Fed. Rep., 989) and *Erie R.R. Co.* vs. *Erie Transportation Co.* (204 U. S., 220)], in his book on Admiralty sets forth clearly the logical result of the doctrine that contribution has its origin in the law of averages:

> "If these last three cases are right, it would seem to follow as an irresistable conclusion that an action for contribution ought to lie by one vessel against the other. The fact that there is no privity between them is immaterial: for general average and contribution do not depend upon questions of privity or contract, but upon principles of natural justice. Indeed the very fact that they were not intentionally concurring in the act complained of is the reason why there should be contribution and why the common law rule does not apply. Hence the reasoning of the Pennsylvania Judge that the right could only be claimed derivatively through the libellant is counter to the original principles on which the doctrine was based. It has been seen that it arose from a desire of the admiralty courts to adjust equitably the relation between the two vessels them-

selves, and not through any consideration of the rights of a third party against them, for his rights are unaffected by the doctrine. And the other reason given in the two cases above cited, holding the adverse doctrine that there is no contribution against tort feasors, is counter to the preponderance of authority, even at common law, which is to the effect that, where the act was not intentional, there may be a contribution between tort feasors.* Hence it is believed that when the question arises, untrammeled by other questions, and is fully presented, the courts will settle upon the doctrine that one of the two vessel owners may proceed against the other to compel a contribution.''

Hughes on Admiralty, p. 284.

*See *Erie R.R. Co.* vs. *Erie Trans. Co.*, 204 U.S. at p. 225.

The right, therefore, to contribution arises, not by reason of the procedure or manner of enforcement, but it comes into existence at the inception of the tort; and an admiralty court has the same power to enforce that right where one only of the joint tort feasors has been proceeded against at the common law, as it has to enforce that right where one only of the joint tort feasors has been proceeded against in admiralty.

Respectfully submitted,

W. S. MONTGOMERY,
Proctor for the Appellant.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

LEHIGH VALLEY RAILROAD COMPANY, Libelant-Appellant. AGAINST The Steamtug IRA M. HEDGES, her engines, tackle, etc., THE CORNELL STEAMBOAT COMPANY, Claimant-Appellee.	No. 18.

BRIEF FOR THE APPELLEE.

STATEMENT OF THE CASE.

This is an appeal from a final decree of the District Court for the Southern District of New York entered on exceptions filed by the claimant upon the grounds (1) that the libel did not state a cause of action and (2) that the matters therein set forth were not within the jurisdiction of the

District Court. Pp. 3, 9. The decree states that the dismissal of the libel is based on the ground that the Court was without jurisdiction, p. 9, and the certificate of the District Judge contains a similar statement. P. 14.

The libel alleges that the Lehigh Valley Railroad Company, libelant, is a corporation of the State of New Jersey, and that at the times mentioned in the libel it was in possession of the tug *Slatington* under a charter of demise. It then states that on June 7, 1904, at about 6.10 P.M. the *Slatington* left Pier 44, North River, with car-float *No. 22* alongside, on the port side, bound for the Lehigh Valley terminal at Jersey City. When about midstream, and headed toward the Jersey shore, the tug *Ira M. Hedges* was seen coming up stream well off on the port side. The *Hedges* had two stone scows in tow; one on each side. In this situation the *Slatington* blew a signal of one blast, but this signal was not answered by the *Hedges* which continued on her course. The *Slatington*, receiving no answer, and seeing that the *Hedges* had not changed her course was stopped, alarm whistles were blown, and the engines were put in reverse motion; but the starboard corner of the scow *Helen* on the starboard side of the *Hedges* collided with the port corner of float *No. 22*, damaging the scow and causing some damage to the guard-rail on car-float *No. 22*.

The libel further asserts that, subsequently, the Rockland Lake Trap Rock Company, owner of the scow *Helen*, brought an action in the Supreme Court of New York for Rockland County, against the libelant, Lehigh Valley Railroad Company, to recover the damages sustained by the scow *Helen* in the collision; that on the second trial of the action a verdict was rendered in favor of the plaintiff against the Lehigh Valley Railroad Company, this libelant, for the damages sustained by the scow *Helen;* and that thereafter the costs were taxed, and a judgment was entered, on June 10, 1907, against the railroad company for the damages sustained by the scow *Helen*, with interest and costs, in the sum of $1,209.31, which judgment the libelant thereafter paid; and that the libelant expended in defending such action, in counsel fees, witness fees and other expenses, the sum of $719.

In conclusion it was alleged that "the said collision and the damages consequent thereon were caused or contributed to by the negligence of the tug *Ira M. Hedges*, or those in charge of her navigation," in certain stated particulars.

The prayer of the libel was "that process in due form of law according to the practice of this Honorable Court in cases of admiralty and maritime jurisdiction may issue out of and under the seal of the said Court against the steamtug *Ira M. Hedges*, her engines, boiler, tackle, etc., and

that said steamtug, her engines, boiler, tackle, etc., may be seized and sold *to pay the amount of the claim set forth in this libel*, together with interest and costs, and for such other and further relief as may appear to this Honorable Court to be just and proper."

The exceptions filed by the claimant were expressed as follows:

"The Cornell Steamboat Company appears specially in this action and excepts to the libel filed herein in this Court on the ground that the same does not state a cause of action and the matters therein set forth are not within the jurisdiction of this Court; wherefore this claimant prays that the libel herein be dismissed with costs."

The exceptions were duly brought on for hearing. Judge Adams subsequently filed an opinion sustaining the exception to the jurisdiction. Pp. 4-8. The final decree, which was entered on the opinion, sustained the exception to the jurisdiction, and dismissed the libel on the ground that the Court was without jurisdiction.

Neither in the opinion nor in the final decree was any ruling made on the exception that the libel did not state a cause of action.

The ground of the decision, as it appears from the opinion, was that the cause of action, whether viewed as a claim for indemnity, or for contribution, was not maritime in character.

The libelant appealed to this Court on the question of jurisdiction, and subsequently also sued out an appeal to the Circuit Court of Appeals for the Second Circuit from the same decree.

During the October Term, 1908, the libelants made a motion to advance and submit the cause in comformity with Rule 32 of this Court. The defendant at the same time presented a motion to dismiss the appeal on the ground that it appeared on the face of the record that the question involved was one of jurisdiction within the meaning of the judiciary act of 1891 permitting appeals to the Supreme Court from the District Court on questions of jurisdiction.

The appelant's motion was denied. The consideration of the motion of the claimant was postponed until the hearing on the merits.

FIRST POINT.

THE CLAIMANT'S MOTION TO DISMISS SHOULD BE GRANTED.

The libel was expressed to be "in a cause of collision, civil and maritime." It prayed for the arrest of the tug *Hedges* under process in the usual form. The claimant appeared specially and claimed that a cause of action was not stated against the tug and that the matters stated in

the libel were not within the jurisdiction of the Court.

The first ground of exception raised the point that the cause of action stated in the libel did not give rise to a maritime lien, and that, accordingly, it afforded no foundation for a proceeding *in rem* against the tug. Though the District Judge did not discuss this matter in his opinion, it was duly raised before him and was necessarily involved in the case.

The action, as stated in the libel, was manifestly one to recover indemnity for the amount of the judgment for damages, costs and interest, and for the amount spent by the libelant in the defense of an action at law.

Though the claim involved in the action at law was maritime in the sense that it could have been sued on in admiralty, yet it was an action in tort in respect of which the plaintiff was entitled to pursue his remedy at law. When the claim became merged in the judgment, and extinguished by payment, it lost its maritime character. If the plaintiff had failed to collect the judgment at law, it could not have maintained an action in admiralty against the libelant's tug *Slatington* based on the judgment. Nor could it have maintained an action against the *Slatington* in admiralty on the original cause of action. It could not thereafter have sued the *Hedges* on the original cause of action. The judgment at law would have

barred such subsequent suits. *Brinsmead* v. *Harrison*, L. R. 7, C. P., 190.

If we are correct in these assumptions, it would seem to follow that the maritime nature of the claim which the plaintiff originally had against the *Slatington* and her owner became merged in the judgment, and that thereafter it became merely a legal claim on the judgment itself, which was extinguished by payment.

The libelant by paying the legal demand against it, under the judgment, could not change the character of the demand so as to restore its maritime character in such sense that he could claim a maritime lien against the tug *Hedges* for the whole or any part of the judgment.

The libel did not state a cause of action *in rem* against the tug, and hence the libel should have been dismissed on this ground. The fact that the Judge did not pass on this point, which was properly raised by the first ground of exception, is unimportant. The claimant is none the less entitled to urge that ground in support of the decision dismissing the libel. The first ground of exception, however, did not purport to raise a question of jurisdiction in the sense of the statute which permits appeals to this Court on the question of jurisdiction. It merely raised the point that the libelant had not set forth facts which justified him in proceeding against the steam tug *Ira M. Hedges* in a proceeding *in rem*.

If such a point raised by exception presents a question of jurisdiction, it would seem to follow that an appeal could be taken to this court from every decree in admiralty in which the existence of a maritime lien is claimed and denied.

The broad question whether the libelant might proceed in a personal action in admiralty for contribution was not before the District Judge.

Until the libel shall be amended so as to allege mutual fault and state a claim for contribution to collision damage, it should be dealt with as a libel to recover indemnity for the entire amount of the judgment for damages, costs, interest, and the amount of legal expenses which the libelant paid in the defense of the action at law.

Without such amendment the learned District Judge should not have dealt with the libel as one filed for contribution to collision damage. But even if the Judge was right in so treating it, still it was expressed to be an action to recover contribution to the amount paid upon a judgment at law, for a tort, and for certain costs and expenses incurred in connection with such judgment; and as the admiralty does not attach a maritime lien to such an action so as to support a libel *in rem*, the claim was properly dismissed on that ground, and the question of the libelant's right to sue for contribution in some other form of admiralty suit was not presented for decision.

An appeal by the libelant from the dismissal

of the libel on the ground that the cause of action stated does not give rise to a maritime lien against the vessel which will support an action *in rem* should be presented to the Court of Appeals and not to this Court.

SECOND POINT.

THE DISTRICT JUDGE PROPERLY DECIDED THAT AS THE LIBELANT WAS SUED AT LAW, HE COULD NOT COME INTO ADMIRALTY FOR CONTRIBUTION, AT LEAST, UNTIL HE HAD SATISFIED THE COURT THAT HE WAS WITHOUT REMEDY ELSEWHERE.

The libelant failed to show that he could not have obtained relief at law if the case was one in which both the Lehigh Valley Railroad Company as owner *pro hac vice* of the *Slatington*, and the Cornell Steamboat Company, as owner of the *Hedges*, were jointly and severally liable to the Rockland Lake Trap Rock Company for the damage to its boat by reason of the faults of their respective servants.

Unless both companies were chargeable with the negligence of their respective servants, no demand for contribution could be pressed in any court. If there was ground for contribution, it would seem that the railroad company could and

should have obtained relief elsewhere. Contribution is not one of the ordinary subjects of admiralty jurisdiction.

1. If the libelant had made a proper application, it could, on appropriate averments, have had the Cornell Steamboat Company made a party defendant in the original action.

The provisions of the New York Code of Civil Procedure on this subject are as follows:

"§ 452 (am'd 1901). *When court to decide controversy, or to order other parties to be brought in.*

The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in. And where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment."

"§ 723 (am'd 1877, 1900). *Amendments by the court, disregarding immaterial errors, etc.*

The court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it

deems just, amend any process, pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of the party, or a mistake in any other respect, or by inserting an allegation material to the case; or, where the amendment does not change substantially the claim or defence, by conforming the pleading or other proceedings to the facts proved."

Under the provisions of Section 723 the Supreme Court of New York had discretionary power to grant an application to direct that the Cornell Steamboat Company be made a party defendant " in furtherance of justice " so that a complete determination of the controversy between all the parties whose rights were involved in the suit, could have been reached. *Gittleman* v. *Feltman*, 191 N. Y., 205.

In that case, after the joinder of issue, an order was made permitting the plaintiff to bring in an additional defendant which it claimed was a joint tortfeasor with the other defendants.

An appeal having been taken from this order to the Appellate Division, and the Appellate Divisions of the State being in conflict on the question, the point was certified to the Court of Appeals. Haight, *J.*, at page 208, said:

* * * " Inasmuch as this provision [§ 452] of the Code pertains to the application of persons to be brought in and made parties to the action

it does not apply to the case which we have under consideration. We must, therefore, look to the provisions of Section 723 for the purpose of determining the rights of the parties in this case. It will be observed that the provisions are very broad and cover precisely the question presented. The Court may at any stage of the action, in furtherance of justice, on such terms as it deems just, amend any process or pleading by *adding* or *striking out* the name of a person as a party. There is nothing in the provisions of this section that we are able to discover, from a careful reading of its provisions, which indicates any legislative intent that its provisions should be limited to equity actions. It is rather apparent that they pertain to all actions, whether at law or in equity, in which such an amendment would be in the 'furtherance of justice.' It is quite true that an order should not be made permitting the striking out of a sole party and the substituting of another party in his place, for the effect would be to terminate the original action and bring a new one. *N. Y. State Milk Pan Assn.* v. *Remington Agr. Works*, 89 N. Y., 22. But in cases where an action may properly be brought against two or more defendants, who were claimed to be jointly liable, or jointly and severally liable upon the claim of the plaintiff, whether it be upon a contract or a tort, we see no reason why the provisions of the Code referred to do not apply to such a case, or why such persons in a proper case may not, in the discretion of the court, be brought in and made parties to the action upon such terms as it deems just. Of course, a per-

son should not be permitted to be brought in as a party defendant, who has no connection with the other defendants, with reference to the matter in controversy, for that would but render the complaint demurrable. The true test, doubtless, is as to whether the person could have been joined as a party at the commencement of the action, and whether the plaintiff has given a satisfactory excuse for his failure so to do. The only exception that now occurs to us is, in cases where the rights of the parties have changed after the bringing of the action by subsequent transactions, in which case the provisions of the Code with reference to supplemental amendments and pleadings would apply.

" The questions certified in this case are:

" *First.*—' Should the motion of the plaintiff to bring in the Surf Amusement Company as a party defendant herein have been granted?'

" *Second.*—' Has the Supreme Court, upon the motion of the plaintiff, in an action to recover damages for personal injuries resulting from negligence, the *power* to bring in as defendant a party not named as a defendant at the time of the commencement of the action, against the objections of the defendants originally named and of the proposed new defendant?'

" The granting of a motion of this character rests in the sound discretion of the Court. It may grant, in the furtherance of justice, on such terms as it deems just. The jurisdiction of this Court is limited to the review of questions of law, and it, therefore, cannot review the discretion of

the Special Term or Appellate Division. We, therefore, have no power to answer the first question certified. The second question, however, is as to the power of the Supreme Court to grant the motion, which calls for an interpretation of the provisions of the Code referred to. With reference to this question we have the power to determine the same, and we think that it should be answered in the affirmative, and the order appealed from affirmed, with costs."

The cases of *Chapman* v. *Forbes*, 123 N. Y., 532, and *Bauer* v. *Dewey*, 166 N. Y., 402, on which the appellant relies, are distinguishable. They do not conflict in any respect with the recent decision in *Gittleman* v. *Feltman*.

In *Chapman* v. *Forbes*, the plaintiff sued in an action for money had and received. The defendant denied the indebtedness. He admitted, however, that he had received the money, but alleged that it was individual property of one Breen, whose assignee had sued to recover it. He further alleged that the fund belonged to Breen, subject to certain equities and agreements between Breen and himself, and he claimed an interest in the fund to that extent. The defendant then moved at Special Term, under Section 452 of the Code, to bring in the assignee, Williams, as a party defendant. The motion was opposed by the plaintiff on two grounds: 1, that Section 452, by its terms, did not authorize the relief

asked; 2, that the Court had no power to grant such relief as to change the character of the action from one at law to one in equity against the plaintiff's will. The Court, at Special Term, granted the motion, but on appeal to the Court of Appeals it was held that Section 452 did not apply.

Section 723, under which the case of *Gittleman* v. *Feltman* was decided, was not involved nor referred to in the case.

In *Bauer* v. *Dewey*, the action was by the plaintiff, as assignee of one Diamond, to recover commissions or compensation for the latter's services as a real estate broker. Soon after the commencement of the action, one Delack made a motion for leave to intervene under Section 452 of the Code, alleging that he was entitled to one-half the commissions owing by the defendant for such services. He further alleged that the assignment was fraudulent and made for the purpose of cheating him out of his share of the commissions. Diamond, in an affidavit, denied any fraud, and also denied that Delack was entitled to any portion of the commission, except a small amount which had been paid. On these papers the Special Term granted an order permitting Delack to intervene, directing that he should be brought in as a party defendant, and that a supplemental summons and complaint should be served upon him. On appeal from this order the Appellate Division affirmed it by a divided Court,

and subsequently certified two questions, of which the Court of Appeals held that it could only consider the following:

" Has Delack, the petitioner herein, such an interest in the subject of this action as entitles him, on his own application, to be brought in as a party defendant by the proper amendment under the provisions of Section 452 of the Code of Civil Procedure?"

It was held that the Supreme Court has no authority under Section 452 of the Code to compel the plaintiff in an action in which a money judgment only is sought, in which the title to no real, specific or tangible personal property is involved, to bring in a third party on his own application.

Section 723 of the Code of Civil Procedure was not involved, nor referred to, in the decision.

The appellant urges that the decision in *Gittleman* v. *Feltman* is merely authority for the proposition that the *plaintiff*, after the joinder of issue, may have leave to amend the proceedings by adding another party defendant. It is true that that was the only point expressly decided; but the language of Section 723 is obviously broad enough to cover an application by a defendant to have another person made a codefendant, and the reasoning of the decision shows that the Court of Appeals considered the section broad enough to cover any case where, in the discretion

of the Court, the addition of another party defendant would be "in the furtherance of justice."

In the absence of an application for relief by the addition of the Cornell Steamboat Company as a party defendant in the original action it should not be assumed that the Court would have refused to exercise its power by directing that such party be brought in so that in the "furtherance of justice" the rights of all parties could be determined in a single proceeding.

If the libelant neglected to have its alleged right of exoneration or contribution litigated and determined in the original action by bringing the Cornell Steamboat Company into the case as a codefendant, it should not now be permitted to escape the consequences of its inaction by attempting to continue the litigation in a different forum.

2. It does not appear that the railroad company exhausted the usual remedies before seeking indemnity or contribution in admiralty.

The rule that there is no contribution among wrongdoers does not apply where one is a tortfeaser only by inference of law. It is confined to cases where one knows, or is presumed to know, that he is doing an unlawful act. *Pollock on Torts*, 6th Ed., p. 195.

The owner of the *Slatington* was a wrongdoer

by inference of law only. It was held liable for the faults of its servants. The allegations of the libel, assuming them to be true, indicate that the owner of the *Hedges* was a wrongdoer only in the same sense. The current of modern anthority suggests that as between wrongdoers of that class contribution may be recovered.

In *Ankeny* v. *Moffett*, 37 Minn., 109, Moffett and Johnson were engaged in building a house. A part of the building fell and injured one Walters. Neither Moffett nor Johnson was guilty of any intentional wrong, or of any bad faith, or of any act illegal in itself. The ground of their liability was mere negligence. Although the case turned on the construction of a statute, the Court said:

"Whether the statute cited was intended to change the rule that there can be no contribution among wrongdoers, it is unnecessary to consider. That rule is applicable only where the person seeking the contribution was guilty of an intentional wrong or at least, where he must be presumed to have known that he was doing an illegal act."

The case of *Armstrong County* v. *Clarion County*, 66 Pa. St., 218, where a bridge which was maintained by the two counties was the cause of the injury holds that the rule of no contribution as between wrongdoers is confined to cases where the plaintiff must be presumed to know that he was doing an unlawful act.

In *Horbach's Admr.* v. *Elder*, 18 Pa. St., 33, five persons are engaged in running a line of stages along a road, for designated parts of which, stages, horses and drivers were to be provided by each at his own expense. Through the carelessness of one of the drivers, the stage was overturned and several of the passengers were injured. For these injuries suits were brought against all the proprietors. Two of the defendants paid about half of the liability. It was held that contribution would lie. The Court based its opinion on the following principle, citing Storey's Equity Juris., I, page 545:

"The right to contribution in equity exists where all are equally bound and are equally relieved; all, therefore, should contribute towards a benefit done to all."

In *Nickerson* v. *Wheeler*, 118 Mass., 295 (1875), liability of a corporation arose because of the neglect of the president and directors to file the annual certificate as required by statute. A decree was entered against the defendants jointly and severally. Levy and execution were had against the president and he paid the judgment. Contribution was allowed. The Court said:

"But although one may have been made liable in tort, he is not necessarily deprived of contribution from another also originally liable, where the foundation of the action is simply negligence on

the part of each in carrying on some lawful transaction. Thus where one or two coach proprietors had been made liable in tort to a party who was injured by the negligence of a servant employed by himself and another, he was entitled to contribution from his coproprietor. *Wooley* v. *Batte*, 2 C. & P., 417. Both were engaged together in lawful business, and the negligence of which they were guilty, in employing a servant from whose misconduct injury resulted, did not place them in such position that they were treated as wrongdoers, whose action against each other could only be founded in their community of wrong. The cases of *Oakes* v. *Spalding*, 40 Vt., 347, and *Spalding* v. *Oakes*, 42 Vt., 343, relied on by the defendants do not conflict with this. The parties to the transaction there were engaged in what was a wrongful act as against any one injured thereby, namely keeping a vicious animal, and the neglect to take care of it, by reason of which it did injury, was not an act of non-feasance merely; the whole act of keeping it was one of misfeasance."

In *Herr* v. *Barber*, 2 Mackey, 545, the limitation is stated as follows:

"The principle that there can be no contribution, at law, enforced by one joint *tort-feasor* against the other wrongdoers, is limited by the modern authorities to cases where the transaction, out of which the judgment arises, involves moral turpitude."

The case held that a breach of trust was such a moral wrong as would not permit contribution.

In *Johnson* v. *Torpy*, 35 Neb., 604, the rule is stated as follows:

"In determining whether the right of contribution exists in favor of one wrongdoer against another, the test is, must the party demanding contribution be presumed to have known that the act for which he has been compelled to respond was wrongful? If not, he may recover against one equally culpable, but otherwise he is without remedy."

To the same effect:

Bank v. *Avery Co.*, 69 Neb., 329.

In *The Hudson*, 15 Fed. Rep., 162, Brown, *J.*, stated the rule as follows:

"In *Arnold* v. *Clifford*, 2 Sum., 238, Story, *J.*, states the rule (that there is no contribution among joint wrongdoers) differently. 'Among joint tortfeasors,' he says, 'who are knowingly such, there can be no contribution.' This rule doubtless applies to persons directly participating in or authorizing any wilful trespass, or any known wrongful acts, or acts obviously of an unlawful character, and to actions involving moral turpitude or incurring statutory penalties. But in *Adamson* v. *Jarvis*, 4 Bing., 66, Best, *C. J.*, says: 'The rule is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act'; and it seems to be settled law that in cases of *quasi* torts only, not involving any moral turpitude or any personal fault, or where the acts are not obviously unlaw-

ful, or the parties are not presumed to have known they were doing any wrong, or where the liability is by implication of law merely, then contribution or indemnity will be enforced."

In *Bailey* v. *Bassing*, 28 Conn., 455, the Court said:

"The rule that there can be no contribution among wrongdoers, has so many exceptions that it can hardly with propriety be called a general rule. It applies properly only to cases where there has been an intentional violation of the law, or where the wrongdoer is to be presumed to have known that the act was unlawful."

In *Chesapeake & Ohio Canal Co* v. *County*, 57 Md., 201, the rule is stated thus:

"In respect to offences in which is involved any moral delinquency or turpitude, all parties are deemed equally guilty, and courts will not inquire into their relative guilt. But where the offense is merely *malum prohibitum*, and is in no respect immoral it is not against the policy of the law to inquire into the relative delinquency of the parties, and to administer justice between them, although both parties are wrongdoers."

Similar principles are enumerated in *Acheson* v. *Miller*, 2 Ohio St., 203; *Upham* v. *Dickinson*, 38 Mich., 338.

The case of *Eaton & Prince Co.* v. *Trust Co.*, 123 Mo. App., 131 (1906), was decided on a stat-

ute which provided for contribution; but the law is stated as follows:

"The tone of the decisions supports the doctrine that in the instance of a negligence tort, when there was no intentional wrong or moral guilt, but two or more tort feasors were actually to blame in fact as well as in law, there can be contribution."

Certain New York cases denying the right to contribution between trustees of corporations in respect of liabilities arising from the failure to file reports as required by statute, appear to rest on the ruling that "the policy of the law is to leave each one to the consequences of his own negligence in order to insure stricter attention on his part." *Andrews* v. *Murray*, 33 Barb., 354. No contribution is permitted where the wrongdoing has been intentional or conscious, *Gilbert* v. *Finch*, 173 N. Y., 455; *Kolb* v. *National Surety Co.*, 176 N. Y., 233; but we are not aware of any authority in New York which is actually at variance with the rule as above stated in the decisions of other States, with regard to contribution between wrongdoers by inference of law.

The appellant contends that the decision of this Court in *Union Stock Yards* v. *Chicago, Burlington and Quincy Ry.*, 196 U. S., 217, is an authority opposed to the notion that contribution could be recovered outside of admiralty on the allegations of the libel in this case.

In that case a brakeman employed by the Terminal Company was injured by reason of a defect in a freight car delivered to it by the Railroad Company, which had been put in service without inspection either by the Railroad Company, or the Terminal Company. An inspection would have discovered the defect. There was nothing to show that the defect had arisen from any negligence or misconduct of the Railroad Company, which had received it from some other railroad. The certificate on which the case came to this Court indicated that the Railroad Company and the Terminal Company were guilty of a like neglect of duty in failing properly to inspect the car. The neglect of the Terminal Company seems however to have been subsequent in time to the fault of the Railroad Company, and if the Terminal Company had performed its duty the consequences of the previous fault of the Railroad Company would have been avoided. The case was not one of a joint tort.

The brakeman recovered a judgment against the Terminal Company which thereupon sued the Railroad Company.

The question certified was whether or not the Railroad Company was "liable to the Terminal Company for the damages which the latter has been compelled to pay to one of its employees on account of injuries he sustained by reason of the defect" in the car.

This Court said:

"The Terminal Company by reason of its fault has been held liable to one sustaining injury thereby. We do not think the case comes within that exceptional class which permits one wrongdoer who has been mulcted in damages to recover indemnity or contribution from another."

The case is one of several torts, committed at different times. In substance it was an action for complete indemnity. The proximate cause of the injury to the brakeman seems to have been the breach of duty of his own employer alone. We do not understand the decision to hold that in cases of joint tort when the wrongdoing charged against the parties arises by inference of law there can be no contribution.

THIRD POINT.

THE LIBELANT IS NOT ENTITLED TO RECOVER A CONTRIBUTION IN ADMIRALTY IN RESPECT OF A COMMON LAW JUDGMENT.

Though the plaintiff might originally have proceeded against the *Slatington* or the *Hedges*, or both, in admiralty, it had an undoubted right to proceed at law, and the Railroad Company has no ground of complaint, because the consequences

of the election exercised by the plaintiff may be different from those which would have followed if the plaintiff had elected to proceed in another forum. As was said by Mr. Chief Justice Waite in *Schoonmaker* v. *Gilmore*, 102 U. S., 118:

"The Judiciary Act of 1789, 1 Stat. at L., 73, sec. 9, reproduced in sec. 563, R. S., par. 8, which confers admiralty jurisdiction on the Courts of the United States, expressly saves to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it. That there always has been a remedy at common law for damages by collision at sea, cannot be denied."

If the owner of the scow had sued the *Slatington* in admiralty, and had recovered its entire damages, the owner of the *Slatington*, if the *Hedges* was also to blame, would have become subrogated to the original libelant's claim against the latter vessel, and could have maintained a libel in admiralty for contribution. *The Mariska*, 107 F. R., 989; *Erie Railroad Co.* v. *Erie Transp. Co.*, 204 U. S., 220; *The Juniata*, 93 U. S., 337, 340, support this view. This result arises from the rule that under the maritime law collision damage is a common loss upon all vessels whose faults have contributed to the damage. Admiralty Rule 59, recognizing this doctrine, provided a way for bringing all vessels charged with fault before the Court, so that the rights and liabilities of all par-

ties concerned in the collision could be adjudicated in a single proceeding. And if one vessel is absent so that it cannot be brought in under Rule 59, contribution for its share of the loss may be obtained by a separate suit.

There is no authority, however, for the proposition that because the plaintiff might originally have sued to recover compensation under the maritime law, a judgment which he has obtained by pursuing his rights at common law may still be used as the basis of an action for contribution in admiralty.

Under the common law a damage caused by collision is not the common loss of the owners of all the vessels which may have contributed to it. If the owner of one vessel in fault sues the owner of another vessel in fault, at common law, the plaintiff's fault bars his right of recovery; and if his boat suffered the entire damage caused by the collision he will have to bear it. And it is manifest that if such a plaintiff should pursue his common law remedy, and fail to recover from the owner of the other guilty vessel because of his own fault, he could not, afterwards, maintain a libel in admiralty, in order to make the loss a common one. The consequences that follow from an action by a party who has a right to maintain it at law for collision damage, may be quite different from those which result from a suit under the admiralty law.

In this case, the plaintiff recovered a judgment on a common law claim for a tort. The original claim became merged in the judgment. Payment of the judgment at law by the defendant in the action extinguished the claim altogether, and if there be no contribution at law, or in equity, between joint tortfeasors, whose faults may have concurred in causing the damage, the payment of the judgment by one tortfeasor operated to release the claim as to other alleged joint tortfeasors. *Selz* v. *Unna*, 6 Wall., 327, 335.

A defendant by paying a judgment obtained against him for a tort at common law does not become subrogated to the plaintiff's original right against another who might also have been sued as a joint tortfeasor.

Without such subrogation (which would follow from the payment of a decree against one of the two joint tortfeasors sued in admiralty) the defendant, who has paid a common law judgment, has no cause of action against his co-tortfeasor on the plaintiff's original claim.

Cases have been cited under the preceding point to the effect that if defendant is a tortfeasor by inference of law merely, as where he is held liable for the faults of his servants, a right of contribution exists against another wrongdoer who might originally have been sued jointly with him in the same cause of action. But if it be considered that those cases are not well founded,

and that no right of contribution in respect of a judgment obtained at law in a tort action exists at law or in equity, then a defendant sued on a tort at law is left to bear the entire burden of any judgment that may be rendered against him.

If this be a hardship in a case where different consequences might have followed if the original plaintiff had elected to sue under the maritime law instead of under the common law, it results from the Act of Congress, which reserves a common law remedy to the plaintiff in such cases. A hardship resulting from the operation of an act of Congress affords no proper ground for extending the admiralty jurisdiction to a case of contribution in respect of a common law judgment which has been paid and satisfied.

LAST POINT.

THE APPEAL SHOULD BE DISMISSED, OR, IN THE ALTERNATIVE, THE DECREE APPEALED FROM SHOULD BE AFFIRMED.

AMOS VAN ETTEN,
Proctor for Appellee.

J. PARKER KIRLIN,
Counsel.

New York, October 25, 1910.

THE IRA M. HEDGES.[1]

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 18. Argued October 27, 1910.—Decided November 7, 1910.

Where the decree of the lower court is founded on denial of jurisdiction of the Admiralty Court, this court has jurisdiction of the appeal.

The right to contribution is not a mere incident of a form of procedure, but it belongs to the substantive law of the admiralty.

The right to contribution in the admiralty cannot be taken away because the claim is asserted against one of those causing the damage at common law and put into judgment.

Where two vessels cause an injury to a third the fact that the injured party obtains judgment against the owners of one of the vessels in fault does not deprive the admiralty of jurisdiction of a suit brought by those against whom the judgment is entered against the other vessel to compel contribution.

Quære as to what, if anything, such judgment conclusively establishes.

THE facts, which involve the jurisdiction of the Admiralty Court, are stated in the opinion.

Mr. William S. Montgomery, with whom *Mr. Geo. H. Emerson* was on the brief, for appellant:

There is no method under the New York Code by which one joint tort-feasor, defendant in an action, can implead another joint tort-feasor as a defendant; nor, if there were, could libellant have compelled the payment by the claimant in the courts of New York of any part of a joint judgment. *Gittleman* v. *Feltman,* 191 N. Y. 205, does not hold that a joint tort-feasor defendant can implead another joint tort-feasor as defendant. All it holds is that a

[1] Docket title, No. 18, Lehigh Valley Railroad Company *v.* Cornell Steamboat Company, Claimant of Steam-tug Ira M. Hedges.

plaintiff may so amend his pleadings as to bring in another tort-feasor as defendant: an entirely different proposition from one joint tort-feasor impleading another as defendant. The rule that one joint tort-feasor cannot implead another as defendant has been settled for many years in New York. *Chapman* v. *Forbes*, 123 N. Y. 532; *Bauer* v. *Dewey*, 166 N. Y. 402.

The fact that one of the parties injured by the collision elected to proceed at common law cannot defeat the libellant's right to contribution—a right recognized by the admiralty law, and brought into existence the very moment the wrong is committed.

There can be no doubt that the right of contribution exists in admiralty. *The Mariska*, 107 Fed. Rep. 991, reversing 100 Fed. Rep. 500.

As the court there said, the Fifty-ninth Rule did not create the right of contribution, but merely recognized the right as preëxisting, and established a means by which it could be easily enforced. The right to enforce contribution does not fail merely because one of the guilty vessels is out of the jurisdiction. It is not dependent upon the accident of locality, nor should it be dependent upon the mere fact that one of the parties sees fit to pursue the common law remedy.

The right is not given by the form of remedy pursued, but is created by the wrong, and being of admiralty origin may be, and should be, recognized in admiralty so long as it remains unsatisfied. *Erie R. R. Co.* v. *Erie Transp. Co.*, 204 U. S. 220, 225.

The lower court meets these decisions by saying that they involve cases originally arising in admiralty, and holds that by one of the parties (the innocent one, of course) proceeding at common law, this right given by the admiralty can be defeated, but cannot be sustained. If the right of contribution exists at all, it exists from the very moment of the collision, being brought into exist-

ence by the collision, and it cannot be defeated or impaired simply because one of the parties elects to proceed in the common law forum.

This is not a case where the libellant is estopped by its election of the remedy, because it had nothing to say with regard to what remedy should be pursued. It might have been different had the Hedges sued at common law for damages incident to a collision. Then the Hedges would have taken the chances of contributory negligence barring a recovery, and the final judgment would then have been *res adjudicata* as to the Hedges' negligence.

The judgment in the common law action was not *res adjudicata*. *Erie R. R. Co.* v. *Erie Transp. Co.*, 204 U. S. 220; and see *The Juniata*, 93 U. S. 337. If the right of contribution in admiralty can be defeated by the innocent party selecting his forum, then grave injustice may be done, something that admiralty, like equity, abhors. The saving to the suitor of the common law remedy does not mean that under its guise a gross injustice may be done, and that admiralty shall be deprived of enforcing a right which it recognizes; and see also Hughes on Admiralty, 276; *The North Star*, 106 U. S. 17, 20. As to the jurisdictional question, see Hughes on Admiralty, 285.

Mr. J. Parker Kirlin, with whom *Mr. Amos Van Etten* was on the brief, for appellee:

The cause of action stated in the libel did not give rise to a maritime lien, and, accordingly, afforded no foundation for a proceeding *in rem* against the tug.

The action was manifestly one to recover indemnity for the amount of the judgment for damages, costs and interest, and for the amount spent by the libellant in the defense of an action at law.

Though the claim involved in the action at law was maritime in the sense that it could have been sued on in

admiralty, yet it was an action in tort in respect of which the plaintiff was entitled to pursue his remedy at law. When the claim became merged in the judgment, and extinguished by payment, it lost its maritime character. *Brinsmead* v. *Harrison*, L. R. 7 C. P. 190.

The libel did not state a cause of action *in rem* against the tug, and hence the libel should have been dismissed on this ground.

Whether the libellant might proceed in a personal action in admiralty for contribution was not before the District Judge, even if the District Judge was right in treating the libel as one filed for contribution to collision damage, the claim was properly dismissed.

The only appeal by the libellant should be presented to the Court of Appeals and not to this court.

The District Judge properly decided that as the libellant was sued at law, he could not come into admiralty for contribution, at least, until he had satisfied the court that he was without remedy elsewhere. N. Y. Code Civ. Proc., §§ 452, 723; and see *Gittleman* v. *Feltman*, 191 N. Y. 205, which governs this case. *Chapman* v. *Forbes*, 123 N. Y. 532, and *Bauer* v. *Dewey*, 166 N. Y. 402, on which the appellant relies, are distinguishable. The libellant having neglected to have its alleged right of exoneration or contribution litigated and determined in the original action by not bringing appellee in as a co-defendant, cannot escape the consequences of its inaction by attempting to continue the litigation in a different forum.

It does not appear that the railroad company exhausted the usual remedies before seeking indemnity or contribution in admiralty. Pollock on Torts, 6th ed., 195. Contribution can be enforced when it is by inference of law only. See *Ankeny* v. *Moffett*, 37 Minnesota, 109; *Armstrong County* v. *Clarion County*, 66 Pa. St. 218; *Horbach's Admr.* v. *Elder*, 18 Pa. St. 33; *Nickerson* v. *Wheeler*, 118 Massachusetts, 295; *Herr* v. *Barber*, 2

Mackey, 545; *Johnson* v. *Torpy*, 35 Nebraska, 604; *Bank* v. *Avery Co.*, 69 Nebraska, 329; *The Hudson*, 15 Fed. Rep. 162; *Bailey* v. *Bassing*, 28 Connecticut, 455; *Ches. & Ohio Canal Co.* v. *County*, 57 Maryland, 201; *Acheson* v. *Miller*, 2 Ohio St. 203; *Upham* v. *Dickinson*, 38 Michigan, 338; *Eaton & Prince Co.* v. *Trust Co.*, 123 Mo. App. 131; *Andrews* v. *Murray*, 33 Barb. 354; *Gilbert* v. *Finch*, 173 N. Y. 455; *Kolb* v. *National Surety Co.*, 176 N. Y. 233; *Union Stock Yards* v. *Chicago, Burlington & Quincy Ry.*, 196 U. S. 217, do not hold that contribution cannot be recovered outside of admiralty on the allegations of the libel in this case.

The libellant is not entitled to recover a contribution in admiralty in respect of a common law judgment. Though the plaintiff might originally have proceeded against the Slatington or the Hedges, or both, in admiralty, it had an undoubted right to proceed at law, and the railroad company has no ground of complaint because the consequences of the election exercised by the plaintiff may be different from those which would have followed if the plaintiff had elected to proceed in another forum. *Schoonmaker* v. *Gilmore*, 102 U. S. 118; *The Mariska*, 107 Fed. Rep. 989; *Erie R. R. Co.* v. *Erie Transp. Co.*, 204 U. S. 220; *The Juniata*, 93 U. S. 337, 340, support this view. Under the maritime law damage by collision is a common loss upon all vessels whose faults have contributed to the damage. Admiralty Rule 59, recognizing this doctrine, provided a way for bringing all vessels charged with fault before the court, so that the rights and liabilities of all parties concerned in the collision could be adjudicated in a single proceeding. And if one vessel is absent so that it cannot be brought in under Rule 59, contribution for its share of the loss may be obtained by a separate suit.

There is no authority, however, for the proposition that because the plaintiff might originally have sued to recover compensation under the maritime law, a judgment

which he has obtained by pursuing his rights at common law may still be used as the basis of an action for contribution in admiralty. *Selz* v. *Unna*, 6 Wall. 327, 335.

A defendant by paying a judgment obtained against him for a tort at common law does not become subrogated to the plaintiff's original right against another who might also have been sued as a joint tort-feasor.

Without such subrogation (which would follow from the payment of a decree against one of the two joint tort-feasors sued in admiralty) the defendant, who has paid a common law judgment, has no cause of action against his co-tort feasor on the plaintiff's original claim.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a libel for contribution. The libel was excepted to by the claimant and was dismissed on the ground that the District Court sitting as a Court of Admiralty had no jurisdiction to enforce contribution between the parties on the facts.

The facts alleged are as follows. The appellant was in possession of the tug Slatington under a demise, and the tug was crossing the North River with car-float No. 22 alongside on the port side. The tug Ira M. Hedges was coming up the river on the port side with two stone scows in tow, one on each side. There was a collision between one of those scows, the Helen, and car-float No. 22, which was caused or contributed to by the Ira M. Hedges. The owner of the Helen, not being the owner of the Ira M. Hedges, brought an action at common law and recovered a judgment against the appellant, the owner of the Ira M. Hedges not being made a party defendant in that suit. The appellant paid the judgment and brought this libel against the Ira M. Hedges, in terms to recover the amount of the claim set forth in the libel, but, it fairly may be held, in substance to recover, if not the whole,

then contribution for what the libellant has had to expend.

The first question is whether this court has jurisdiction of the appeal. It is said that the dismissal of the libel, although expressed to be for want of jurisdiction, really is on the merits, because payment of a judgment at common law is not a ground for contribution from a joint wrongdoer, not a party to the suit. There sometimes is difficulty in distinguishing between matters going to the jurisdiction and those determining the merits. *Fauntleroy* v. *Lum*, 210 U. S. 230, 235, and, no doubt, this case presents that difficulty. But perhaps it may be said that the two considerations coalesce here. The admiralty has a limited jurisdiction. If there are no merits in the claim it is of a kind that the admiralty not only ought not to enforce but has no power to enforce. At all events, the form of the decree must be taken to express the meaning of the judge. If the decree was founded, as it purports to be, on a denial of jurisdiction in the court, this court has jurisdiction of the appeal. For all admiralty jurisdiction belongs to courts of the United States as such, and therefore the denial of jurisdiction brings the appeal within the established rule. See *The Steamship Jefferson*, 215 U. S. 130, 138.

Coming to the substance we are of opinion that the decision was wrong. The right to contribution belongs to the substantive law of the admiralty. *Erie R. R. Co.* v. *Erie & Western Transportation Co.*, 204 U. S. 220. It is not a mere incident of a form of procedure. Therefore the fact, over which the libellant had no control, that the injured party saw fit to sue at common law cannot take that right away. The passing of the claim against the libellant into the form of a judgment before the claim was satisfied has no bearing upon the question whether the right to contribution remains. It does not matter to this question, even if it be true, as thought by the court below,

that the libellant might have required the owner of the Ira M. Hedges to be made a party. For it still would have rested with the plaintiff in the former suit to collect from the appellant alone if it saw fit, and, if it had done so, it is at best but a speculation to suggest that the libellant could have recovered from its co-defendant at common law.

The question as to what is conclusively established by the common law judgment is not before us, but only the jurisdiction of the court. But we may add that the appellant seeks to recover contribution for the amount paid, not as *res judicata*, but as one of the consequences of a joint tort from which it could not escape, and which its fellow wrongdoer was bound to contemplate. The claimant of course does not desire to dispute the appellant's negligence. It is free to deny its own. Whether if it were so minded it could controvert the amount of the damage as determined by the judgment need not be discussed. No doubt it would have been a prudent course for the appellant to give notice to the owner of the Ira M. Hedges to take part in the defence, with a view to its possible ultimate liability. Whether a failure to do so would affect its rights is not before us to decide. We do not mean to intimate that the failure is material where there has been a *bona fide* defence.

Decree reversed.